THIS BOOK
MUST NOT BE REMOVED
FROM THE LIBRARY

UNIVERSITY OF LONDON LIBRARY

REFERENCE ONLY

BOUND BY WOOD, LONDON

REFERENCE ONLY

346.4
Mx. North Gall.

THE

INCORPORATED COUNCIL OF LAW REPORTING

FOR

ENGLAND AND WALES.

Members of the Council.

Chairman—C. M. WARMINGTON, Esq., K.C.
Vice-Chairman—F. A. BOSANQUET, Esq., K.C.

EX-OFFICIO MEMBERS.

SIR ROBERT B. FINLAY, Knt., M.P. . .	ATTORNEY-GENERAL.
THE RIGHT HON. SIR EDWARD H. CARSON, Knt., M.P.	SOLICITOR-GENERAL.

THE RIGHT HON. SIR HENRY FOWLER, G.C.S.I., M.P., President of the Incorporated Law Society.

ELECTED MEMBERS.

W. C. RENSHAW, Esq., K.C. T. ROLLS WARRINGTON, Esq., K.C.	Lincoln's Inn.
F. A. BOSANQUET, Esq., K.C. M. C. BUSZARD, Esq., K.C.	Inner Temple.
C. M. WARMINGTON, Esq., K.C. A. T. LAWRENCE, Esq., K.C.	Middle Temple.
JAMES MULLIGAN, Esq., K.C. J. C. LEWIS COWARD, Esq., K.C.	Gray's Inn.
W. ENGLISH HARRISON, Esq., K.C., of the Middle Temple. ROBERT F. NORTON, Esq., K.C., of Lincoln's Inn.	Appointed by the Council of Law Reporting on the nomination of the General Council of the Bar.
JOHN HOLLAMS, Esq. (Firm—Messrs. Hollams, Sons, Coward & Hawksley), 30, Mincing Lane, E.C. E. J. BRISTOW, Esq. (Firm—Messrs. Wilson, Bristows & Carpmael), 1, Copthall Buildings, E.C.	Incorporated Law Society.

Secretary—PATRICK F. EVANS, Esq., 10 Old Square, Lincoln's Inn, London, W.C.

1901.

THE

LAW REPORTS

OF THE INCORPORATED COUNCIL OF LAW REPORTING.

HOUSE OF LORDS,

JUDICIAL COMMITTEE OF THE PRIVY COUNCIL,

AND

PEERAGE CASES.

EDITOR—SIR FREDERICK POLLOCK, BART., *Barrister-at-Law.*
ASSISTANT EDITOR—A. P. STONE, *Barrister-at-Law.*

REPORTERS.

House of Lords—English and Irish Appeals and Peerage Cases	J. M. MOORSOM, K.C.	
House of Lords—Scottish and Divorce Appeals and Scottish Peerage Cases	GERALD J. WHEELER,	*Barrister-at-Law.*
Privy Council Appeals (including Appeals from Ecclesiastical Courts)	HERBERT COWELL,	*Barrister-at-Law.*

1901.

LONDON:
Printed and Published for the Council of Law Reporting
BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.
PUBLISHING OFFICE, 7, FLEET STREET, E.C.

BIBL. LONDIN UNIV.

MEMORANDUM.

On Tuesday, January 22, 1901, *it pleased Almighty God to take to His mercy our late* Sovereign Lady Queen Victoria *of blessed memory.*

On Thursday, January 24, 1901, *it having been determined by the Lord Chief Justice, the Master of the Rolls, the Lords Justices, the President of the Probate and Divorce Division, and all the Judges in the Royal Courts assembled, except five Judges away on Circuit and at the Central Criminal Court, that on the demise of the Crown all judicial persons should be resworn on the oath of allegiance as well as on the judicial oath to* King Edward VII. *as soon as conveniently might be, the following were duly sworn by the King's Coroner in open Court in the Lord Chief Justice's Court:—*

Lord Alverstone C.J., *and* Mathew, Grantham, Lawrance, Wright, Bruce, Kennedy, Ridley, Phillimore, *and* Bucknill JJ.

The President of the Probate and Divorce Division, the Lords Justices, and the Chancery Judges were resworn on January 25 *before the Lord Chancellor in his private room.*

Feb. 15. The King *was pleased by several Letters Patent under the Great Seal to appoint and declare—*

That the persons who were appointed by Her late Majesty to be of Her Majesty's Counsel learned in the law should be of His present Majesty's Counsel learned in the law, with all such precedence, power, and authority as were originally granted to them.

JUDGES AND LAW OFFICERS.

MEMORANDA.

Sept. 8. Lord Morris and Killanin, *formerly one of the Lords of Appeal in Ordinary, died at his residence, Spiddal, County Galway, at the age of* 74.

Oct. 19. The Right Honourable Sir Richard Henn Collins, *one of the Lords Justices of Appeal, was appointed Master of the Rolls*

in the place of THE RIGHT HONOURABLE SIR ARCHIBALD LEVIN SMITH, *and* SIR JAMES CHARLES MATHEW, *one of the Justices of the High Court of Justice, was appointed one of the Lords Justices of Appeal, and was afterwards sworn of the Privy Council.*

Oct. 20. THE RIGHT HONOURABLE SIR ARCHIBALD LEVIN SMITH *died in Aberlour, Morayshire, at the age of* 65. *He had a few days before his death resigned his office of Master of the Rolls.*

Oct. 22. JOSEPH WALTON, ESQ., *one of His Majesty's Counsel, was appointed one of the Justices of the High Court of Justice. He was afterwards knighted.*

Nov. 2. THE HONOURABLE SIR HERBERT HARDY COZENS-HARDY, *one of the Justices of the High Court of Justice, was appointed one of the Lord Justices of Appeal in the place of* THE RIGHT HONOURABLE SIR JOHN RIGBY, *resigned, and was afterwards sworn of the Privy Council.*

ARTHUR RICHARD JELF, ESQ., *one of His Majesty's Counsel, was appointed one of the Justices of the High Court of Justice in the place of* THE HONOURABLE SIR JOHN CHARLES DAY, *resigned, and* CHARLES SWINFEN EADY, ESQ., *one of His Majesty's Counsel, was appointed one of the Justices of the High Court of Justice in the place of* THE HONOURABLE SIR HERBERT HARDY COZENS-HARDY. *They were afterwards knighted.*

Dec. 3. THE RIGHT HONOURABLE SIR ANDREW RICHARD SCOBLE, K.C.S.I., K.C., *and* THE RIGHT HONOURABLE SIR JOHN WINFIELD BONSER *were appointed Members of the Judicial Committee of the Privy Council, under the provisions of the Act* 3 & 4 *Will.* 4, *c.* 41.

ERRATA.

Page	*Line*	*For*	*Read*
26	8	*A. B. Bell*	*H. B. Bell.*
188	14	"bequest was a gift to a class"	"bequest was not a gift to a class."
238	footnote (1)	35 R. R. 372	35 R. R. 732.
319	18	*Armstrong* v. *Mills*	*British South Africa Co.* v. *Companhia de Moçambique.*
326	8	*After* direct." *add*—," and is now re-enacted in substantially the same terms by No. 19 of the Regulations gazetted on June 3, 1895.	
416	footnote (2)	[1891] 1 Q. B. 148	[1897] 1 Q. B. 148.
478	„ (2)	5 H. L. 480	L. R. 5 H. L. 480.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1901, will be as follows :—

In the First Series,
[1901] 1 Ch. [1901] 2 Ch.

In the Second Series,
[1901] 1 K. B. [1901] 2 K. B. [1901] P.

In the Third Series,
[1901] A. C.

The Scottish Law Reports are cited as follows :—

Shaw, or, First Series Court of Session Cases	.	.	by	S.
Dunlop, or, Second Series	„	„	„	.	.	„	D.
Macpherson, or, Third Series	„	„	„	.	.	„	M.
Rettie, or, Fourth Series	„	„	„	.	.	„	R.
Fraser, or, Fifth Series	„	„	„	.	.	„	F.
Scottish Law Reporter	„	„	„	.	.	„	S. L. R.
Morison's Dictionary, or, the Collection of Old Cases	.	„	Mor. Dict.

A TABLE

OF THE

NAMES OF THE CASES REPORTED

IN THIS VOLUME.

A.

	PAGE
Ajum Goolam Hossen & Co., Hajee Cassim Joosub *v.* P. C.	362
v. Union Marine Insurance Company – – – P. C.	362
Amalgamated Society of Railway Servants, Taff Vale Railway Company *v.* – H. L. (E.)	426
Andrew Knowles & Sons, Limited, Lysons *v.* – H. L. (E.)	79
Angèle (Master and Owners of SS.), Baku Standard (Master and Owners of SS.) *v.* – P. C.	549
Attorney-General, London County Council *v.* H. L. (E.)	26
Attorney-General for Victoria, Bullivant *v.* – H. L. (E.)	196
Colonial Sugar Refining Company *v.* – – – P. C.	544
Australian Gold Recovery Company *v.* Lake View Consols P. C.	142

B.

	PAGE
Baker, Nireaha Tamaki *v.* P. C.	561
Baku Standard (Master and Owners of SS.) *v.* Angèle (Master and Owners of SS.) P. C.	549

PAGE

Barclay, Curle & Co., Osborne *v.* H. L. (Sc.) 269
Bedford (Duke of) *v.* Ellis H. L. (E.) 1
Belilios, Hardoon *v.* – P. C. 118
Birkenhead Assessment Committee, Mersey Docks and Harbour Board *v.* H. L. (E.) 175
Bullivant *v.* Attorney-General for Victoria – H. L. (E.) 196
Butchart *v.* Butchart H. L. (D.) 266

C.

Caledonian Coal Company *v.* Seaham Colliery Company P. C. 554
Callander, Smith *v.* H. L. (Sc.) 297
Canton Insurance Office, Limited, Williams & Co. *v.* H. L. (E.) 462
Charles A. Vogeler Company, Cooke *v.* – – H. L. (E.) 102
Charlesworth, Pilling & Co., Secretary of State for Foreign Affairs *v.* – – – P. C. 373
Chittagong (Owners of SS.) *v.* Kostroma (Owners of SS.) P. C. 597
Colonial Sugar Refining Company *v.* Attorney-General for Victoria – – – P. C. 544
Commissioner of Taxes, Scottish Provident Institution *v.* P. C. 340
Cook *v.* Ricketson – – P. C. 588
Cooke *v.* Charles A. Vogeler Company – – H. L. (E.) 102
Cory, Dovey *v.* – H. L. (E.) 477
Cowley (Earl) *v.* Cowley (Countess) – – – H. L. (D.) 450

D.

Dovey *v.* Cory – H. L. (E.) 477
Durant, Keighley, Maxsted & Co. *v.* – – H. L. (E.) 240

E.

East Indian Railway Company *v.* Kalidas Mukerjee – P. C. 396
Ellis, Bedford (Duke of) *v.* H. L. (E.) 1

F.

PAGE

Falkners Gold Mining Company *v.* McKinnery – – P. C. 581
Fitzroy Corporation, Melbourne Tramway and Omnibus Company *v.* – – – P. C. 153

G.

Galliers *v.* Rycroft – – P. C. 130
Great Western Railway Company *v.* London and County Banking Company – H. L. (E.) 414
Gregory, *Ex parte* – – P. C. 128

H.

Hajee Cassim Joosub *v.* Ajum Goolam Hossen & Co. – P. C. 362
Hardoon *v.* Belilios – P. C. 118
Harney, Minister of Mines *v.* P. C. 347
Harvey *v.* Rex – – P. C. 601
Henderson's Patent, *In re* P. C. 616
Hoddinott *v.* Newton, Chambers & Co., Limited – H. L. (E.) 49

I.

Inland Revenue Commissioners *v.* Muller & Co.'s Margarine, Limited – – H. L. (E.) 217

---

v. Priestley – H. L. (I.) 208

J.

Jobson & Co., Raine *v.* H. L. (E.) 404

K.

Kalidas Mukerjee, East Indian Railway Company *v.* – P. C. 396
Keighley, Maxsted & Co. *v.* Durant – – H. L. (E.) 240
Kingsbury *v.* Walter H. L. (E.) 187
Kostroma (Owners of SS.), Chittagong (Owners of SS.) *v.* P. C. 597

L.

Lake View Consols, Australian Gold Recovery Company *v.* P. C. 142

PAGE

Leathem, Quinn *v.* – H. L. (I.) 495
Livingstone *v.* Ross – P. C. 327
London and County Banking Company, Great Western Railway Company *v.* – H. L. (E.) 414
London County Council *v.* Attorney-General H. L. (E.) 26
Lysons *v.* Andrew Knowles & Sons, Limited – H. L. (E.) 79

M.

McKinnery, Falkners Gold Mining Company *v.* – – P. C. 581
Melbourne Tramway and Omnibus Company *v.* Fitzroy Corporation – – – P. C. 153
Mersey Docks and Harbour Board *v.* Birkenhead Assessment Committee – H. L. (E.) 175
Minister for Lands *v.* Wilson P. C. 315
Minister of Mines *v.* Harney P. C. 347
Muller & Co.'s Margarine, Limited, Inland Revenue Commissioners *v.* – H. L. (E.) 217

N.

Newton, Chambers & Co., Limited, Hoddinott *v.* H. L. (E.) 49
Nireaha Tamaki *v.* Baker – P. C. 561
Nixon & Bruce, Stuart *v.* H. L. (E.) 79

O.

Osborne *v.* Barclay, Curle & Co. H. L. (Sc.) 269

P.

Patrick, Smith *v.* – H. L. (Sc.) 282
Payton & Co. *v.* Snelling, Lampard & Co. – – H. L. (E.) 308
Perera *v.* Perera – – P. C. 354
Priestley, Inland Revenue Commissioners *v* – H. L. (I.) 208

Q.

PAGE

Quinlan *v.* Quinlan – – P. C. 612
Quinn *v.* Leathem – H. L. (I.) 495

R.

Raine *v.* Jobson & Co. H. L. (E.) 404
Rex, Harvey *v.* – – P. C. 601
Ricketson, Cook *v.* – – P. C. 588
Ross, Livingstone *v.* – P. C. 327
Russell (Earl), Trial of – H. L. 446
Rycroft, Galliers *v.* – – P. C. 130

S.

Scottish Provident Institution *v.* Commissioner of Taxes – P. C. 340
Seaham Colliery Company, Caledonian Coal Company *v.* P. C. 554
Secretary of State for Foreign Affairs *v.* Charlesworth, Pilling & Co. – – – P. C. 373
Smith *v.* Callander – H. L. (Sc.) 297
——— *v.* Patrick – H. L. (Sc.) 282
Snelling, Lampard & Co., Payton & Co. *v.* – – H. L. (E.) 308
Stuart *v.* Nixon & Bruce H. L. (E.) 79

T.

Taff Vale Railway Company *v.* Amalgamated Society of Railway Servants – H. L. (E.) 426

U.

Union Marine Insurance Company, Ajum Goolam Hossen & Co. *v.* – – – P. C. 362

W.

Walter, Kingsbury *v.* H. L. (E.) 187
Williams & Co. *v.* Canton Insurance Office, Limited H. L. (E.) 462
Wilson, Minister for Lands *v.* P. C. 315

TABLE OF CASES CITED.

A.

		PAGE
Aberdeen Steam Trawling and Fishing Company *v.* Peters	1 F. 786	408
Adair *v.* New River Company	11 Ves. 429	10
Alexander *v.* Lowson's Trustees	17 R. 571	289
Allan *v.* Liverpool	L. R. 9 Q. B. 180	408
Allen, In re	29 W. R. 480; 44 L. T. 240	193
—— *v.* Flood	[1898] A. C. 1	495
Allison *v.* Monkwearmouth Shore	4 E. & B. 13	179
Alps, The	[1893] P. 109	464
Amos, In re	[1891] 3 Ch. 159	436
Anderson *v.* Campbell	16 Fac. Coll. 207	275
——— *v.* Morice	L. R. 10 C. P. 58	362
Armory *v.* Delamirie	1 Sm. L. C. 10th ed. p. 343	243
Arrospe *v.* Barr	8 R. 603	465
Ashby *v.* White	1 S. L. C. 231	452
Aspinall *v.* Duckworth	35 Beav. 307.	194
Attorney-General *v.* Beech	[1899] A. C. 53	211
——— *v.* Bouwens	4 M. & W. 171	222
——— *v.* Dimond	1 C. & J. 356; 35 R. R. 372	238
——— *v.* Dodington	[1897] 2 Q. B. 373	209
——— *v.* Windsor (Dean and Canons of)	24 Beav. 679; 8 H. L. C. 369	4
Attorney-General for New South Wales *v.* Walters	[1898] A. C. 460	318
Austen *v.* Boys	2 De G. & J. 635	222

B.

Balsh *v.* Hyham	2 P. Wms. 453; 2 Eq. C. Ab. 741, fol. 8	124
Barber *v.* Fleming	L. R. 5 Q. B. 59	465
—— *v.* Lesiter	7 C. B. (N.S.) 175	529
Barrow Hæmatite Steel Company, In re	[1900] 2 Ch. 846	480
Barwick *v.* English Joint Stock Bank	L. R. 2 Ex. 259	433
Beck *v.* Railway Teamsters' Protective Union	74 Amer. St. R. 421	505
Bedford (Duke of) *v.* Ellis	[1901] A. C. 1	434
Bedouin, The	[1894] P. 1	467
Beeching *v.* Lloyd	3 Drew. 227	3
Bensaude *v.* Thames and Mersey Marine Insurance Company	[1897] A. C. 609	465
Bentley *v.* Vilmont	12 App. Cas. 471	416
Benton *v.* Pratt	2 Wend. 385	505

		PAGE
Berry's Patent	7 Moore, 187	617
Billings *v.* Holloway	[1899] 1 Q. B. 71	65
Bird *v.* Brown	4 Ex. 786; 19 L. J. (Ex.) 154; 14 Jur. 132	247
—— *v.* Gibb	8 App. Cas. 559	552
Blackwood *v.* London Bank of Australia	L. R. 5 P. C. 92	318
Blain, Ex parte	12 Ch. D. 522	105
Bloxam *v.* Metropolitan Railway Company	L. R. 3 Ch. 337	479
Board *v.* Titterton	13 Cape S. C. 164	133
Boots *v.* Grundy	82 L. T. 769; 48 W. R. 638	505
Bourke *v.* Lucas	3 N. S. W. R. 217	582
Boutwell *v.* Marr	76 Amer. St. R. 746	505
Bowen *v.* Hall	6 Q. B. D. 342	502
Bower *v.* Lewis	9 App. Cas. 890	133
Bower Barff Patent	[1895] A. C. 675	617
Bradford Corporation *v.* Pickles	[1895] A. C. 587	524
Brankelow Steamship Company *v.* Canton Insurance Office	[1899] 2 Q. B. 178	462
British South Africa Company *v.* Companhia de Moçambique	[1893] A. C. 627	319
Brogden *v.* Metropolitan Railway Company	2 App. Cas. 692	247
Bromage *v.* Prosser	4 B. & C. 247; 28 R. R. 241	524
Brook *v.* Hook	L. R. 6 Ex. 89	242
Brown *v.* Black	L. R. 15 Eq. 363; 8 Ch. 939	119
Buchanan *v.* Towart	Mor. Dict. 7609	275
Bungaree (Shire of) *v.* Ballarat Water Commission	4 A. J. R. 187	159
Burchell *v.* Wilde	[1900] 1 Ch. 551	222
Buron *v.* Denman	2 Ex. 167	242
Bush *v.* Fox	5 H. L. C. 707	145
Byrne *v.* Van Tienhoven	5 C. P. D. 344	262
Bywater *v.* The Crown	2 Pat. App. 563	277

C.

Carmont's Case	14 Rep. Pat. Cas. 239	618
Cartwright *v.* Sculcoates Union	[1900] A. C. 159	179
Castellan *v.* Hobson	L. R. 10 Eq. 47	119
Chambers *v.* Miller	13 C. B. (N.S.) 125	417
Chapleo *v.* Brunswick Permanent Building Society	6 Q. B. D. 696	433
Chaplin's Trusts, In re	33 L. J. (Ch.) 183	192
Chaytor *v.* Trinity College	3 Anstr. 841	9
Cherokee Nation *v.* State of Georgia	5 Peters, U.S. 1	566
Churton *v.* Douglas	Joh. 174	220
Clark *v.* Fisherton-Angar	6 Q. B. D. 139	179
Clarke *v.* London and County Banking Company	[1897] 1 Q. B. 552	417
Clifford *v.* Brandon	2 Camp. 358; 11 R. R. 731	505
Clink *v.* Radford	[1891] 1 Q. B. 625	465
Cockburn *v.* Thompson	16 Ves. 321	10
Coggs *v.* Bernard	2 Ld. Raym. 909; 1 Sm. L. C. 167	398
Collett *v.* London and North Western Railway Company	16 Q. B. 984	396
Colquhoun *v.* Brooks	14 App. Cas. 493	48

		PAGE
Coltness Iron Company *v.* Black	6 App. Cas. 315	30
Combe *v.* De La Bere	22 Ch. D. 316	318
Commercial Bank of South Australia, In re	33 Ch. D. 174	104
Commissioners of Sewers *v.* Gellatly	3 Ch. D. 615	443
Commissioners of Stamps *v.* Hope	[1891] A. C. 476	222
Cook *v.* Sprigg	[1899] A. C. 572	565
Cooper *v.* Metropolitan Board of Works	25 Ch. D. 472	220
Cotterell *v.* Jones	11 C. B. 713	503
Cotton *v.* Wood	8 C. B. (N.S.) 568	398
Cowley (Earl) *v.* Inland Revenue Commissioners	[1899] A. C. 198	211
Crispin, Ex parte	L. R. 8 Ch. 374	105
Crook *v.* Morley	[1891] A. C. 316	105
Crump *v.* Commonwealth	10 Amer. St. R. 903	505
Cundy *v.* Lindsay	3 App. Cas. 459	417

D.

Dacre's (Lady) Case	Journals of H. L., July 4, 1661, p. 298	451
Daniel *v.* Metropolitan Railway Company	L. R. 5 H. L. 45	398
Daniels *v.* Harris	L. R. 10 C. P. 1	364
Danubian Sugar Factories *v.* Inland Revenue Commissioners	[1901] 1 Q. B. 245	222
Davidson *v.* Burnand	L. R. 4 C. P. 117	364
Davies *v.* Lowndes	1 Bing. N. C. 597	460
De Bay, The	8 App. Cas. 559	552
Delz *v.* Winfree	26 Amer. St. R. 755	505
Denham & Co., In re	25 Ch. D. 752	492
Dobbs *v.* Grand Junction Waterworks Company	9 App. Cas. 49	31
Dolbear's Case	13 Rep. Pat. Cas. 203	617
Drakeford *v.* Drakeford	33 Beav. 43	194
Du Boulay *v.* Du Boulay	L. R. 2 P. C. 430	460
Dudgeon *v.* Pembroke	L. R. 9 Q. B. 581	365
Duffield's Case	5 Cox C. C. 404	511
Durham and Sunderland Railway Company *v.* Wawn	3 Beav. 119	556

E

Ebbw Vale Steel, Iron, and Coal Company, In re	4 Ch. D. 827	480
Emperor *v.* Rolfe	1 Ves. Sen. 208	133
England *v.* Webb	[1898] A. C. 758	342
Essenden Corporation *v.* Blackwood	2 App. Cas. 583	158

F.

Falcke *v.* Scottish Imperial Insurance Company	34 Ch. D. 234	254
Featherstone's Trusts, In re	22 Ch. D. 111	188
Fendall *v.* Goldsmid	2 P. D. 263	452
Ferguson *v.* Green	[1901] 1 Q. B. 575	51
Fisher *v.* Roberts	6 Times L. R. 354	424
Fletcher *v.* Peck	6 Cranch, 87	566
Flitcroft's Case	21 Ch. D. 519	478

		PAGE
Flowers *v.* Chambers	[1899] 2 Q. B. 142	404
Follett *v.* Jeffereys	1 Sim. (N.S.) 1	199
Foster *v.* Bates	12 M. & W. 226	243
Fraser *v.* Murdoch	6 App. Cas. 855	119

G.

Gardner *v.* Trechmann	15 Q. B. D. 154	466
Garnsey *v.* Flood	[1898] A. C. 687	318
Gartside *v.* Outram	26 L. J. (Ch.) 113	200
German Mining Company, In re	4 D. M. & G. 19	125
Gibbs & Sons *v.* Société des Métaux	25 Q. B. D. 399	104
Gilroy *v.* Price & Co.	[1893] A. C. 56	364
Golden Fleece, The	2 Asp. M. L. R. 431, n.	365
Gray *v.* Chaplin	2 S. & S. 267; 2 Russ. 137; 26 R. R. 22	9
Green *v.* Bulton	2 C. M. & R. 707; 41 R. R. 818	505
Gregory *v.* Brunswick (Duke of)	6 M. & G. 205, 953; 6 Scott N. R. 809; 1 C. & K. 31	503
Gresham Life Assurance Society *v.* Styles	[1892] A. C. 309	30
Gresley *v.* Mousley	2 K. & J. 288	200
Grissell *v.* Bristowe	L. R. 4 C. P. 36	120

H.

Hall *v.* Snowden	[1899] 2 Q. B. 136	406
Hallmark's Case	9 Ch. D. 329	492
Hansen *v.* Harrold	[1894] 1 Q. B. 612	465
Harris *v.* Rothwell	35 Ch. D. 416	145
Hart *v.* Alexander	2 M. & W. 484	289
Haward *v.* Suffolk (Duke of)	Dyer, 79 b	451
Hawke *v.* Corri	2 Hagg. Con. 280	452
Hemming *v.* Maddick	L. R. 7 Ch. 395	120
Hennessey *v.* McCabe	[1900] 1 Q. B. 491	405
Higgons *v.* Burton	26 L. J. (Ex.) 342	420
Hill, Clark & Co. *v.* Dalgety	[1898] A. C. 343	318
Hilton *v.* Eckersley	6 E. & B. 74	525
Hobbs *v.* Wayet	36 Ch. D. 256	120
Hollins *v.* Fowler	L. R. 7 H. L. 757	417
Holywell Union *v.* Halkyn Drainage Company	[1895] A. C. 117	158
Hopkinson's Patent	[1897] A. C. 249	616
Horwood *v.* Smith	2 T. R. 750	416
Hughes-Hallett *v.* Indian Mammoth Gold Mines Company	22 Ch. D. 561	126
Huttley *v.* Simmons	[1898] 1 Q. B. 181	503

I.

Income Tax Acts, In re	23 Vict. L. R. 574	342
Inland Revenue Commissioners *v.* Angus	23 Q. B. D. 590	232
——— *v.* Glasgow and South Western Railway Company	12 App. Cas. 315	221
Inman Steamship Company *v.* Bischoff	7 App. Cas. 670	464

J.

		PAGE
Jackson, In re	25 Ch. D. 162	192
Jacobs *v.* Seward	L. R. 5 H. L. 464	556
James *v.* May	L. R. 6 H. L. 328	119
Jervis *v.* Wolferstan	L. R. 18 Eq. 18	119
Johnson *v.* Mackintosh	8 Wheaton, 543	566
Jones *v.* Garcia del Rio	1 T. & R. 297; 24 R. R. 64	3
—— *v.* Mersey Docks	11 H. L. C. 443	179

K.

Kearney *v.* Lloyd	26 L. R. Ir. 268	540
Kellock *v.* Enthoven	L. R. 8 Q. B. 458; 9 Q. B. 247	120
Kelner *v.* Baxter	L. R. 2 C. P. 174	242
Kidner *v.* Keith	15 C. B. (N.S.) 35	222

L.

Lacave & Co. *v.* Crédit Lyonnais	[1891] 1 Q. B. 148	416
Lagunas Nitrate Company *v.* Lagunas Syndicate	[1899] 2 Ch. 392	480
Lake's Patent	[1891] A. C. 240	618
Lancashire Telephone Company *v.* Manchester Overseers	14 Q. B. D. 267	158
Lands Allotment Company, In re	[1894] 1 Ch. 616	479
Leathem *v.* Craig	[1899] 2 I. R. 667	495
Lee *v.* Neuchatel Asphalte Company	41 Ch. D. 1	480
Leeds Building Society *v.* Mallandaine	3 Tax Cases, 577	32
Leeds Estate Building and Investment Company *v.* Shepherd	36 Ch. D. 787	479
Levi *v.* Ayers	3 App. Cas. 842	119
Lincoln Corporation *v.* Holmes Common	L. R. 2 Q. B. 482	157
London, Brighton and South Coast Railway Company *v.* London and South Western Railway Company	4 De G. & J. 362	556
London County Council *v.* Erith	[1893] A. C. 592	179
Longman *v.* East	3 C. P. D. 156	319
Loring *v.* Davis	32 Ch. D. 625	120
Lumley *v.* Gye	2 E. & B. 216	502
Lyell *v.* Kennedy	14 App. Cas. 437	254
Lyons *v.* Wilkins	[1896] 1 Ch. 811; [1899] 1 Ch. 255	432, 505, 540

M.

Macleod *v.* Attorney-General for New South Wales	[1891] A. C. 455	448
McMahon *v.* Burchell	2 Ph. 127	556
McNicholas *v.* Dawson	[1899] 1 Q. B. 773	406
Madrid and Valencia Railway Company, In re	3 De G. & Sm. 127	104
Martin *v.* Lee	14 Moo. P. C. 142	131
Mason *v.* A. R. Dean, Limited	[1900] 1 Q. B. 770	51
Matheson Brothers, In re	27 Ch. D. 225	104

		PAGE
Matheson *v.* Kilburn	Unreported	255
Mathews *v.* Brown & Co.	63 L. J. (Q.B.) 494	416
Matthiessen *v.* London and County Bank	5 C. P. D. 7	424
Maude *v.* Brook	[1900] 1 Q. B. 575	51
Melbourne Tramway Company *v.* Melbourne Corporation	24 V. L. R. 33	156
Merchant Shipping Company *v.* Armitage	L. R. 9 Q. B. 99	473
Merchants' Trading Company *v.* Universal Marine Insurance Company	2 Asp. M. L. R. 431, n.	365
Merrill *v.* Wilson	[1901] 1 K. B. 35	404
Mersey Docks *v.* Liverpool	L. R. 9 Q. B. 84	178
Mersey Docks and Harbour Board *v.* Birkenhead	L. R. 8 Q. B. 445	179
——— *v.* Lucas	8 App. Cas. 891	32
Mersey Docks Trustees *v.* Gibbs	L. R. 1 H. L. 93	430
Metropolitan Railway Company *v.* Jackson	47 L. J. (Ex.) 303	398
——— *v.* Wright	11 App. Cas. 152	268
Meux *v.* Maltby	2 Swans. 277.	443
Mexican and South American Mining Company, In re	26 Beav. 172	104
Michau *v.* Michau (Executor)	11 Cape S. C. 362	132
Mills' Estate, In re	34 Ch. D. 24	319
Milne, In re	1 Natal Law Rep. 88; 3 Natal Law Rep. 56	131
Milne & Co. *v.* Aberdeen District Committee	2 F. 220	280
Minet *v.* Morgan	L. R. 8 Ch. 361	200
Mogul Case	[1892] A. C. 25; 23 Q. B. D. 614	503, 504
Mozley *v.* Alston	1 Ph. 799	5
Mulcahy *v.* Reg.	L. R. 3 H. L. 317	529
Musgrave *v.* Pulido	5 App. Cas. 102	576

N.

National Bank of Wales, In re	[1899] 2 Ch. 629	477
National Financial Company, In re	L. R. 3 Ch. 791	120
Noble *v.* Ahier	11 P. D. 158	318
Norway, The	3 Moo. P. C. (N.S.) 245	473

O.

O'Loghlen, Ex parte	L. R. 6 Ch. 406	106
Overend & Gurney Company *v.* Gibb	L. R. 5 H. L. 480	478
Oxford Benefit Building and Investment Society, In re	35 Ch. D. 502	479

P.

Parker *v.* Felgate	8 P. D. 171	354
Pascal, Ex parte	1 Ch. D. 509	105
Pearks *v.* Moseley	5 App. Cas. 714	192
Pearson, Ex parte	[1892] 2 Q. B. 263	105
Penny *v.* Penny	L. R. 5 Eq. 227	377
Perfect *v.* Curzon (Lord)	5 Madd. 442; 21 R. R. 331	133

		PAGE
Phené *v.* Gillan	5 Hare, 1	119
Phillips *v.* Eyre	L. R. 6 Q. B. 1	242
Pickup *v.* Thames and Mersey Insurance Company	3 Q. B. D. 594	363
Pieper's Case	12 Rep. Pat. Cas. 292	617
Pimlico Tramway Company *v.* Greenwich Union	L. R. 9 Q. B. 9	153
Pollard *v.* Bank of England	L. R. 6 Q. B. 623	417
Portobello (Magistrates of) *v.* Edinburgh (Magistrates of)	10 R. 130	280
Postlethwaite, In re	35 Ch. D. 722	199
Potter *v.* Inland Revenue Commissioners	10 Ex. 147	219, 230
Powell *v.* Apollo Candle Company	10 App. Cas. 282	449
Prahran Corporation *v.* Carter	15 V. L. R. 228	156
Pretorius *v.* Pretorius (Executors of)	2 Juta, 293	132
Punnett, Ex parte	16 Ch. D. 226	220

R.

Rance's Case	L. R. 6 Ch. 104	479
Ranger *v.* Great Western Railway Company	5 H. L. C. 86	433
Readhead *v.* Midland Railway Company	L. R. 4 Q. B. 379	398
Reg. *v.* Cox and Railton	14 Q. B. D. 153	199
—— *v.* Debruiel	11 Cox C. C. 207	449
—— *v.* Druitt	10 Cox C. C. 600	525
—— *v.* Hughes	L. R. 1 P. C. 81	566
—— *v.* Parnell	14 Cox C. C. 508	511
—— *v.* Rowlands	2 Den. C. C. 364	526
—— *v.* Symonds	Parliamentary Paper relative to affairs of New Zealand, Dec. 1847, p. 64	565
—— *v.* Topping	Dears. C. C. 647; 7 Cox C. C. 103	449
—— *v.* Verrall	1 Q. B. D. 9	179
—— *v.* Warburton	L. R. 1 C. C. 276	529
—— *v.* West Middlesex Waterworks	1 E. & E. 716	159
Rex *v.* Eccles	1 Lea. C. C. 274	505
—— *v.* Journeymen Tailors of Cambridge	8 Mod. 11	530
—— *v.* Mawbey	6 T. R. 619; 3 R. R. 282	531
Reynolds, Ex parte	15 Q. B. D. 169	104
Rice *v.* Manley	66 N. Y. (21 Sichels) 82	505
Ricket *v.* Metropolitan Railway Company	L. R. 2 H. L. 175	232
Ricketson *v.* Cook	20 N. S. W. L. R. 298	592
Rigby *v.* Connol	14 Ch. D. 489	428
Rivett-Carnac's (Sir J.) Will, In re	30 Ch. D. 136	451
Robertson *v.* Quiddington	28 Beav. 529	221
Rogers *v.* Rajendro Dutt	13 Moo. P. C. 209	566
Rolfe *v.* Flower Salting & Co.	L. R. 1 P. C. 27	289
Rowland's Case	5 Cox C. C. 436	511
Ruck *v.* Williams	3 H. & N. 308	432
Russell *v.* Jackson	9 Hare, 387	200

S.

		PAGE
Sales *v.* Blane	14 Q. B. 205	120
Sandes *v.* Wildsmith	[1893] 1 Q. B. 771	23
Santos *v.* Illidge	29 L. J. (C.P.) 348	449
Saunderson *v.* Griffiths	5 B. & C. 909	252
Saxby's Patent	L. R. 3 P. C. 292	616
Scott *v.* London and St. Catherine Docks Company	3 H. & C. 596	398
—— *v.* Scott	3 Sw. & Tr. 319	268
Scottish Co-operative Society *v.* Glasgow Fleshers' Association	35 Sc. L. R. 645	505
Sculcoates Union *v.* Dock Company at Kingston-upon-Hull	[1895] A. C. 136	157, 179
Scully *v.* Murn	14 N. S. W. R. 289	581
Semet and Solvay's Patent	[1895] A. C. 78	616
Sevenoaks Railway Company *v.* London, Chatham and Dover Railway Company	11 Ch. D. 625	429
Shaw *v.* MacMahon	4 D. & War. 431	188
Simms *v.* Registrar of Probates	[1900] A. C. 323	199
Smelting Company of Australia *v.* Inland Revenue Commissioners	[1897] 1 Q. B. 175	217
Soames *v.* Spencer	1 D. & R. 32; 24 R. R. 631	253
Solomon *v.* Bitton	8 Q. B. D. 176	268
Spencer *v.* Livett	[1900] 1 Q. B. 498	405
Spengler *v.* Higgs (Executors of)	1 Roscoe, 221	133
Stanhope's Case	27 Beav. 201	192
Stebbing *v.* Metropolitan Board of Works	L. R. 6 Q. B. 37	377
Steel *v.* State Line Steamship Company	3 App. Cas. 72	364
Stevenson *v.* Newnham	13 C. B. 297	508
Strick *v.* Swansea Tinplate Company	36 Ch. D. 558	428
Stringer's Case	L. R. 4 Ch. 475	489
Stroud *v.* Lawson	[1898] 2 Q. B. 44	4
Stuart *v.* Nixon	[1901] A. C. 79	407
Sturgess *v.* Pearson	4 Madd. 411; 20 R. R. 316	133

T.

Taylor *v.* Goodwin	4 Q. B. D. 228	69
Temperton *v.* Russell	[1893] 1 Q. B. 435	2, 436
—— *v.* ——	[1893] 1 Q. B. 715	495
Thakoor Chunder Poramanick *v.* Ramdhone Bhattacharjee	6 Suth. W. R. 228	377
Thomas *v.* Kelly	13 App. Cas. 511	92
Thomas Blyth, The	Lush. 16	552
Thorley, In re	[1891] 2 Ch. 613	545
Tobin *v.* Reg.	16 C. B. (N.S.) 310	564
Trego *v.* Hunt	[1896] A. C. 7	220
Trevor *v.* Whitworth	12 App. Cas. 409	480
Trollope *v.* London Building Trades Federation	72 L. T. 342	432
Turnbull, Martin & Co. *v.* Hull Underwriters' Association	5 Com. Cas. 248	465

U.

		PAGE
United States *v.* Holmes	18 U. S. 412	449

V.

Vegelahn *v.* Guntner	167 Mass. 92	503
Vere *v.* Ashby	10 B. & C. 298; 34 R. R. 408	254

W.

Wakelin *v.* London and South Western Railway Company	12 App. Cas. 41	398
Walker *v.* Mottram	19 Ch. D. 355	221
Walsby *v.* Anley	3 E. & E. 516	505
Warrick *v.* Queen's College, Oxford	L. R. 6 Ch. 716	3
Watson *v.* Swann	11 C. B. (N.S.) 756	254
Weale *v.* West Middlesex Waterworks Company	1 Jac. & W. 358; 21 R. R. 183	3
Welfare *v.* London and Brighton Railway Company	L. R. 4 Q. B. 693	398
West London Syndicate *v.* Inland Revenue Commissioners	[1898] 2 Q. B. 507	221
White *v.* Garden	10 C. B. 919	416
Whitehouse *v.* Fellowes	10 C. B. (N.S.) 765	432
Williams *v.* Quebrada Railway Company	[1895] 2 Ch. 751	199
Wilmer *v.* McNamara & Co.	[1895] 2 Ch. 245	479
Wilson *v.* Tumman	6 Man. & G. 236	254
Wi Parata *v.* Wellington (Bishop of)	3 N. Z. J. R. (N.S.) S. C. 72	561
Wolfe *v.* Matthews	21 Ch. D. 194	428
Wood *v.* Walsh & Sons	[1899] 1 Q. B. 1009	51
Worcester *v.* State of Georgia	6 Peters, U.S. 515	566
Wright and Inland Revenue Commissioners, In re	11 Ex. 458	220

Appeal Cases

BEFORE

THE HOUSE OF LORDS

(ENGLISH—IRISH—AND SCOTTISH)

AND

THE JUDICIAL COMMITTEE

OF

HER MAJESTY'S MOST HONOURABLE

PRIVY COUNCIL.

[HOUSE OF LORDS.]

THE DUKE OF BEDFORD . . . . APPELLANT; H. L. (E.)

AND 1900

ELLIS AND OTHERS . . . . . RESPONDENTS. *Dec.* 10.

Practice—Parties—Representative Action—Action on behalf of a Class of the Public—Joinder of Plaintiffs—Joinder of several Causes of Action—Rules of Supreme Court, Order XVI., rr. 1, 9.

Order XVI., r. 9, which provides for persons suing or being sued as representing a class, is not confined to persons who have or claim some beneficial proprietary right which they are asserting or defending. To justify a person suing in a representative character it is enough that he has a common interest with those whom he claims to represent.

Several plaintiffs sued on behalf of themselves and all others the growers of fruit, flowers, vegetables, roots and herbs within the meaning of the Covent Garden Market Act, 1828, to enforce various preferential rights to stands in the market, which they alleged to have been given to the class of growers by the Act. The defendant was the lord of the market:—

Held, that without prejudging the construction of the Act the plaintiffs had an interest in common, and that the defendant was not entitled to have the action stayed either on the ground that the plaintiffs had no beneficial proprietary right, or that the joinder of plaintiffs claiming separate and

H. L. (E.)
1900
BEDFORD (DUKE OF) v. ELLIS.

different rights under the Act, both personally and as representing a class, would embarrass or delay the trial.

The decision of the Court of Appeal, [1899] 1 Ch. 494, affirmed by Lords Macnaghten, Morris and Killanin, and Shand, the Earl of Halsbury L.C. and Lord Brampton dissenting.

Temperton v. *Russell*, [1893] 1 Q. B. 435, reflected on.

Quære, whether it was necessary to join the Attorney-General as a defendant.

THE respondents, Ellis and five other persons, on behalf of themselves and all others the growers of fruit, flowers, vegetables, roots or herbs within the meaning of the 9 Geo. 4, c. cxiii., brought an action against the appellant, the Duke of Bedford.

By the statement of claim they set forth certain provisions of the Covent Garden Market Act, 1828 (9 Geo. 4, c. cxiii., a public Act), which they alleged gave various preferential rights in respect of the use of the market to the class of growers. They alleged that the Duke in his management of the market as owner did not comply with the provisions of the Act in certain particulars, and had (inter alia) exacted excessive tolls from the growers. They claimed declarations that they were entitled to the alleged preferential rights, an injunction to restrain the Duke from doing any acts contrary to declarations so claimed, and an account of the sums charged in excess during the six years preceding the issue of the writ. The material parts of the statement of claim and the Act are fully set out in the report of the decision below (1) and are closely discussed in the judgment of Lord Brampton.

The Duke having taken out a summons to set aside the writ and all other proceedings, Romer J., being of opinion that the plaintiffs were not entitled to sue on behalf of themselves and all others the growers of fruit, &c., within the meaning of the Act, nor to sue together as co-plaintiffs in one action in respect of the alleged causes of action respectively alleged by them personally and otherwise than in their capacity as representing themselves and all other growers, ordered that the action be stayed in respect of all matters and causes alleged in a representative capacity, and that unless the plaintiff should within

(1) [1899] 1 Ch. 494.

fourteen days elect one of them to proceed as sole plaintiff and only in respect of his individual and personal causes of action, the action should be dismissed with costs.

The Court of Appeal (Lindley M.R. and Rigby L.J., Vaughan Williams L.J. dissenting), upon the plaintiffs undertaking to add the Attorney-General as a defendant, ordered that the plaintiffs be at liberty to amend the writ and statement of claim accordingly, and to amend the statement of claim as they might be advised, and that the order of Romer J. be discharged.

The Duke appealed.

May 8, 10. *Levett, Q.C.*, and *Danckwerts, Q.C.*, for the appellant. The respondents claim to sue as representatives of the growers, relying upon Order XVI., r. 9, which provides that "where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued . . . . on behalf or for the benefit of all persons so interested." But this only extends "to persons who have or claim some beneficial proprietary right which they are asserting or defending in the cause or matter": *Temperton* v. *Russell*. (1) The respondents have no such right, and there is not here "one cause or matter." If any respondent has a personal injury owing to a breach of the statutory obligations he can sue for himself, but he cannot sue for such a vague and indefinite class as all growers: see per Lord Eldon in *Weale* v. *West Middlesex Waterworks Co.* (2); *Jones* v. *Garcia del Rio*. (3) There is no precedent in the books for such an action.

The cases relied on by Lindley M.R.—*Beeching* v. *Lloyd* (4) and *Warrick* v. *Queen's College, Oxford* (5)—are quite different. Shareholders in a company, tenants of a manor, creditors of a debtor, can all be ascertained. Growers cannot: they number many thousands, and exist all over the country and abroad. Any one may become a grower at any time. If there be any such right as is claimed for growers, it is a right which can

(1) [1893] 1 Q. B. 435, 438.
(2) (1820) 1 Jac. & W. 358, 370, 372; 21 R. R. 183.
(3) (1823) 1 T. & R. 297, 301; 24 R. R. 64.
(4) (1855) 3 Drew. 227.
(5) (1871) L. R. 6 Ch. 716.

H. L. (E.) 1900 BEDFORD (DUKE OF) v. ELLIS.

only be enforced (if at all) by the Attorney-General representing the public. If any one has suffered special damage he can sue, but must sue alone. But in truth he can have no right of action under this statute unless he has a lease. Every one has a right to resort to a public market, and this statute confers no right on growers as such. The clauses relied on by the respondents are simply for regulating the market and appropriating particular spaces to particular things—potatoes, fruit, flowers, &c.—and the necessary stands. No action lies for a public nuisance without proof of special damage: if there be any right of action at all here it is in tort for excluding the plaintiffs, but the procedure in Chancery does not apply to actions in tort. Romer J. decided that the Attorney-General alone could sue for the class of growers, and said that the rest of the public might be represented by the Solicitor-General. This was doubted by Lindley M.R., who said he had never heard of such a proceeding. It was adopted in *Attorney-General* v. *Dean and Canons of Windsor* (1), where the Attorney-General appeared for the informant and the Solicitor-General for the Crown. Secondly, this is a joinder of several plaintiffs for several distinct causes of action. It is not allowed by Order XVI., r. 1; the rights do not "arise out of the same transaction or series of transactions": *Stroud* v. *Lawson*. (2)

Asquith, Q.C., and *J. T. Prior*, for the respondents. The right to sue in a representative capacity is not confined to "a beneficial proprietary right." That is given as an instance, but it is not exclusive. A body of persons having a common interest in a subject-matter may when that interest is threatened be represented by one or more on behalf of the whole. Here the rights and the common interest are created by statute. It is true that in the case of the yearly pitching stands the letting is permissive, not compulsory; but they can only be let to growers. The yearly cart stands must be exclusively appropriated to the growers' carts, and must be let to them at the schedule tariff. The Duke refused to obey this requirement, and for that there is a cause of action. The statute, no doubt, appropriates and regulates places and stands, but it also imposes

(1) (1858) 24 Beav. 679; (1860) 8 H. L. C. 369. (2) [1898] 2 Q. B. 44.

an obligation on the Duke to carry out the requirements for the benefit of the growers. This is, no doubt, a large and fluctuating class, but it is one capable of being ascertained, and it has rights antagonistic to that of the general public, and could not therefore be properly represented by the Attorney-General. Rights are claimed in respect of each of the three classes, casual cart stands, yearly cart stands, and yearly pitching stands, and the plaintiffs may succeed in one or two of these and fail in the other; but that is no reason why the claims should not be joined. It is enough that the plaintiffs have a right or rights as a class and against a common enemy.

Secondly, Order XVI., r. 1, embraces this case. There is no reason why each plaintiff should bring a separate action; the claims all arise out of the same transaction or series of transactions, the management of the market.

Levett, Q.C., in reply. Where a grievance complained of is common to a body of persons too numerous to be all made parties, the Court allows one or more to sue for all, provided all the parties have an interest identical with that of the plaintiffs; if what is asked may by possibility be injurious to any of them, those parties must be made defendants, because each of them may have a case to make adverse to the interest of the parties suing. If indeed they are so numerous that it is impossible to make them all defendants, that is a state of things for which no remedy has yet been provided. The words of Lord Cottenham in *Mozley* v. *Alston* (1) are applicable here. The growers are too numerous to be made all defendants. The relief claimed in this action might be injurious to some of the class.

The House took time for consideration.

Aug. 6. EARL OF HALSBURY L.C. My Lords, in this case I feel some difficulty about the judgment that I ought to pronounce. It is not a judgment upon the merits of the cause, but it is in an interlocutory proceeding claiming that the action is improperly constituted and insisting upon the necessity of

(1) (1847) 1 Phill. 790, 799.

H. L. (E.) 1900 BEDFORD (DUKE OF) v. ELLIS. Earl of Halsbury L.C.

selecting some one or more plaintiffs who shall represent the same rights. My Lords, I have read the judgment proposed to be delivered by my noble and learned friend Lord Brampton, and I agree with it, but I have great difficulty in arguing the question upon an interlocutory proceeding, for this reason: it appears to me that one of the questions which undoubtedly will arise in the course of the cause will be the question of what rights, if any, exist among the different members of the class—those persons who are put together here as plaintiffs. I have found myself in this difficulty, that if I gave all the reasons for which I agree with my noble and learned friend, Lord Brampton, it appears to me it would be impossible for me afterwards to take a different view when the question comes to be tried at the hearing of the cause. I think I might find it extremely difficult in saying what I should say to your Lordships now to avoid prejudicing those questions which have not been argued yet. The result is that while I content myself with saying I agree with Lord Brampton in differing from what has been done in the Court below, I do not propose at present to give any reasons for my adherence to his view.

LORD MACNAGHTEN. My Lords, the action in which this application was made relates to the right of accommodation in Covent Garden Market. The market belongs to the Duke of Bedford, but it is regulated by the provisions of an Act of Parliament passed in the year 1828 (9 Geo. 4, c. cxiii.). The Act is concerned with the persons who come to the market to buy or to sell. No toll is payable by those who buy, unless the articles bought are again sold within the market or exposed for sale there. The persons who come to sell have to pay rent and toll. They are divided into two classes—those who sell their own produce and those who are ordinary dealers in the market or middlemen. For some reason or other the Act purports to confer certain advantages and certain preferential rights on the persons who come to sell their own produce. It may be that at the time when the Act was passed market gardeners in the county of Middlesex were not without influence in the electorate. It may be that in those days protection was not such

an odious thing as it is now in the eyes of some people who worship political economy. Whatever the reason may have been it cannot be denied that the Act apparently does give a preference to those who are described as growers of fruit, flowers, vegetables, roots or herbs. Now several people come forward as plaintiffs. They allege that they are growers within the meaning of the Act. They claim that under the Act they are entitled to certain advantages and preferential rights. They say that the Duke, who is lord of the market, persistently ignores their rights and favours the middlemen from whom he is authorized to exact higher tolls. And they sue on behalf of themselves and all other the growers of fruit, flowers, vegetables, roots or herbs within the meaning of the Act. They seek a declaration as to the true construction of the Act, an injunction to restrain the infringement of their alleged statutory rights, and an account of the moneys by which as they allege they have been severally overcharged.

The Duke has applied by summons to stay the action on two grounds, which were mixed up in the argument, but which ought, I think, to be kept separate and distinct. The principal ground is that the plaintiffs are not entitled to sue in a representative character in defence of their alleged statutory rights. The other ground, which is a matter of very slight moment, is that they cannot join as co-plaintiffs in respect of their several grievances. The whole difficulty in the present case has arisen from confusing these two matters. They have really nothing to do with each other. If the persons named as plaintiffs are members of a class having a common interest, and if the alleged rights of the class are being denied or ignored, it does not matter in the least that the nominal plaintiffs may have been wronged or inconvenienced in their individual capacity. They are none the better for that and none the worse. They would be competent representatives of the class if they had never been near the Duke; they are not incompetent because they may have been turned out of the market. In considering whether a representative action is maintainable, you have to consider what is common to the class, not what differentiates the cases of individual members. Romer J. acceded to the

H. L. (E.) 1900 BEDFORD (DUKE OF) v. ELLIS. Lord Macnaghten.

defendant's application, influenced, or rather I should say compelled, by an expression in the judgment of the Court of Appeal in the case of *Temperton* v. *Russell* (1), which has found its way into recent books of practice as a compendious and authoritative statement of the law. In *Temperton* v. *Russell* (1) the Court was composed of Lord Esher M.R. and Lindley and Bowen L.JJ. The judgment of the Court was delivered by Lindley L.J. His Lordship is represented as saying that Order XVI. r. 9, which provides for persons suing or being sued as representing a class, "only extends to persons who have or claim some beneficial proprietary right which they are asserting or defending." Now it cannot be said that the plaintiffs in this case are asserting any beneficial proprietary right. If that be a condition of suing in a representative character the plaintiffs are out of Court. But it seems to me that there is no reason whatever for so restricting the rule, which was only meant to apply the practice of the Court of Chancery to all divisions of the High Court. The old rule in the Court of Chancery was very simple and perfectly well understood. Under the old practice the Court required the presence of all parties interested in the matter in suit, in order that a final end might be made of the controversy. But when the parties were so numerous that you never could "come at justice," to use an expression in one of the older cases, if everybody interested was made a party, the rule was not allowed to stand in the way. It was originally a rule of convenience: for the sake of convenience it was relaxed. Given a common interest and a common grievance, a representative suit was in order if the relief sought was in its nature beneficial to all whom the plaintiff proposed to represent. To limit the rule to persons having a beneficial proprietary interest would be opposed to precedent, and not, I think, in accordance with common sense. Take the case of a creditor's suit, which perhaps was the earliest instance of plaintiffs being allowed to sue in a representative character. It can hardly be suggested that a creditor has a proprietary interest in the real or personal estate of his deceased debtor. Take another case which was common enough in former times.

(1) [1893] 1 Q. B. 435.

One parishioner would sue on behalf of himself and all the other parishioners to establish a modus in lieu of tithes. There was no beneficial proprietary interest there. The choice lay between two evils; and the plaintiff, suing in a representative character, insisted on choosing the lesser evil of the two: *Chaytor* v. *Trinity College*. (1) Again, in *Gray* v. *Chaplin* (2) two shareholders of a navigation were held justified in suing on behalf of themselves and all other the shareholders except the defendants in order to enforce their alleged statutory rights under an Act of Parliament. The equity in that particular case happened to be very shadowy, and the receiver appointed by the Vice-Chancellor was afterwards discharged by Lord Eldon (3); but it was not suggested in the argument before his Lordship that the Vice-Chancellor had been in error in holding the suit as regards the plaintiffs properly constituted. There are plenty of other cases which shew that, in order to justify a person suing in a representative character, it is quite enough that he has a common interest with those whom he claims to represent. In *Warrick* v. *Queen's College* (4) the question was whether persons with titles diverse in origin and rights in some respects distinct could be combined as plaintiffs in a suit to redress a grievance common to all. No such question can arise here. All growers have the same rights. They all rely on one and the same Act of Parliament as their common charter.

My Lords, I do not think it is necessary to say anything more upon this point. I have only said so much because I find that the learned Lord Justice who dissented from his colleagues still maintains a position which Lindley L.J. abandoned, if indeed he ever took it up. Vaughan Williams L.J. puts the successful argument, or the argument intended to be successful, in the mouth of the defendant. It seems to rest on two main grounds: (1.) that the special rights apparently conferred upon the growers are public rights—a proposition which I confess I do not understand; and (2.) that those special rights confer on the growers no right of property whatever—a proposition

(1) (1796) 3 Anstr. 841.
(2) (1825) 2 S. & S. 267.
(3) (1826) 2 Russ. 137; 26 R. R. 22.
(4) L. R. 6 Ch. 716.

H. L. (E.) 1900 BEDFORD (DUKE OF) v. ELLIS. Lord Macnaghten.

which I suppose everybody would concede. It is rather a pity when a case like *Temperton* v. *Russell* (1) finds its way into the Reports. The attempt made there to invest the defendants with a representative character was absurd on the face of it. Now, when a judge comes to deal with a case of that sort, and tries to deal with it seriously, as if there was something in it, he is very apt, I think, to express himself unguardedly; and so it happens sometimes, as it happened, I suppose, in *Temperton* v. *Russell* (1), that what was only meant for an illustration is taken for a definite and exhaustive statement of law.

There is one point—a point of no practical importance—on which I venture respectfully to differ from the Court of Appeal. I doubt whether it is accurate to say that in the case of representative suits we have advanced a long way since the days of Lord Eldon. It is, of course, not necessary nowadays to go to a Court of Law in order to establish legal rights. But in all other respects I think the rule as to representative suits remains very much as it was a hundred years ago. From the time it was first established it has been recognised as a simple rule resting merely upon convenience. It is impossible, I think, to read such judgments as those delivered by Lord Eldon in *Adair* v. *New River Co.* (2), in 1805, and in *Cockburn* v. *Thompson* (3) in 1809, without seeing that Lord Eldon took as broad and liberal a view on this subject as anybody could desire. "The strict rule," he said, "was that all persons materially interested in the subject of the suit, however numerous, ought to be parties . . . . but that being a general rule established for the convenient administration of justice must not be adhered to in cases to which consistently with practical convenience it is incapable of application." "It was better," he added, "to go as far as possible towards justice than to deny it altogether." He laid out of consideration the case of persons suing on behalf of themselves and all others, "for in a sense," he said, "they are before the Court." As regards defendants, if you cannot make everybody interested a party, you must bring so many that it can be said they will

(1) [1893] 1 Q. B. 435. (2) (1805) 11 Ves. 429.
(3) (1809) 16 Ves. 321, 325, 329.

fairly and honestly try the right. I do not think, my Lords, that we have advanced much beyond that in the last hundred years, and I do not think that it is necessary to go further, at any rate for the purposes of this suit.

My Lords, it would be highly improper at this stage of the proceedings to say anything which might prejudge the construction of the Act. That is a matter for the hearing. But out of respect for the arguments of counsel, I will venture to make one or two general observations. It was said that the growers are so fluctuating and indefinite a body that it is impossible to tell who is or who is not a grower, especially in these modern times when there are such improved facilities for carriage of goods. I cannot say that I am much impressed with that difficulty. It seems to me that the description of the persons apparently intended to be favoured by the Act is sufficient for all practical purposes. It may be difficult or impossible to compile a catalogue of growers. But there cannot, I think, be much difficulty in determining whether a particular person who claims a preferential right to a vacant stand in the market is a grower or not.

Then it was urged that, after all, it is for the Duke to regulate his own market. The Act, it was said, is merely an enabling Act; the growers have no rights whatever. Well, that is the very question to be determined at the hearing. And how can it be determined if the growers are not allowed to sue in a body? The learned counsel for the Duke of Bedford asserted that the Duke was master of the situation, and might do what he liked with his own. It may be so. All I would say is that I am not at present convinced by the able and earnest arguments of Mr. Levett and Mr. Danckwerts that the expectations apparently held out to growers by this Act of Parliament are wholly illusory, and that the Duke, who is empowered by the Act to make rules, orders, and by-laws, "not being repugnant," as the Act says, "to the laws of this realm or to the provisions of this Act," is at liberty to disregard and ignore those provisions at his own will and pleasure.

One word as to the Attorney-General, without whose

H. L. (E.)
1900
BEDFORD (DUKE OF) v. ELLIS.
Lord Macnaghten.

presence the learned judges of the Court of Appeal thought the action ought not to proceed. The Attorney-General has been or will be made a party in obedience to the order of the Court of Appeal. From that part of the order there is no appeal. Speaking, however, for myself, I cannot see what the Attorney-General has to do with the matter. The plaintiffs do not want him; still less does the defendant. The learned counsel on both sides professed to be unable to explain this part of the order of the Court of Appeal. What is the Attorney-General to do when he comes? Is he to support the growers, or is he to take part with the Duke, who is alleged to favour the middlemen, or is he merely to look on and see fair play? And who is to pay his costs? That may be an interesting question some day. No one has suggested that the people who come to buy will be injured by competition between the growers and the middlemen, or that the rights of the public are in any way imperilled by this action. It might have been proper to have had the middlemen represented if the Duke himself had not espoused their cause.

So much for the principal question. The other point put forward is one of very small importance. If the main point goes against the defendant, I do not suppose that he would care to succeed on the other and minor point. He would gain nothing by success. He would only lose to some extent security for his costs. The joinder of the individual plaintiffs in one action cannot embarrass or delay the trial. The language of Order XVI., r. 1, is very wide. It must cover the case of several creditors, joining as co-plaintiffs in a creditor's action. Their debts are separate, and just as much or just as little "a series of transactions" as the separate grievances of which the growers in this action complain. Assuming that the defendant has rejected the claims of the several plaintiffs on the ground that, according to the true construction of the Act, growers have no preferential claims to which he is bound to give effect, it appears to me that you have a series of transactions where, if the plaintiffs sued separately, a common question of law would arise. Whether I am right in this or not, it seems to me that the question, if it be a question, ought not to be

disposed of adversely to the plaintiffs at this stage of the action.

On these grounds I think the appeal ought to be dismissed with costs.

[The proceedings were here interrupted.]

Dec. 10. LORD MORRIS AND KILLANIN. My Lords, I am of opinion that this appeal should be dismissed.

The action is brought by the plaintiffs asserting a common right as growers of fruit, &c., within the meaning of the Act 9 Geo. 4, c. 113. The action is a representative one alleging a common interest, namely, the assertion of a right alleged to be created in the class by Act of Parliament. The appellant succeeded in obtaining an order from Romer J. (now Romer L.J.) that the action should be stayed. Romer J. was unable to come to the conclusion that the growers as a class had any proprietary rights in respect of the market. What they alleged they had was a preferential right over the rest of the public; that should, in my opinion, have been inquired into at a hearing in the ordinary way when, if they cannot establish such preferential right as a class, they would be defeated; if they have such a right some of the class are entitled to sue on behalf of themselves and others. I entirely concur in the judgment of my noble and learned friend Lord Macnaghten, which deals so fully and conclusively with the right to sue in that character.

I do not at all mean to prejudge the question whether the plaintiffs may not fail on the hearing of the cause on a fuller consideration of the Act considered in relation to the evidence that may be adduced. I conceive and foresee considerable difficulty in the plaintiffs being able to define what was the status or class of a "grower" in the year 1828, and in applying such a description to present times, and also whether the preference conferred was not given to sales of the articles specified and not to growers of them, and whether there is anything granted beyond a permission to the Duke of Bedford and his heirs to let. These and other questions will be dealt with on the hearing. I merely decide that, in my opinion,

H. L. (E.) 1900 BEDFORD (DUKE OF) v. ELLIS.

the appellant cannot get rid of the action by the short cut resorted to.

LORD SHAND. My Lords, the rule of Court (rule 9 of Order XVI.), the effect of which is the subject of controversy between the parties in this case, is in these terms: "Where there are numerous persons having the same interest in one cause or matter, one or more of such persons may sue or be sued . . . . in such cause or matter on behalf or for the benefit of all persons so interested." I am of opinion, with the majority of the Court of Appeal, that the rule applies to this case, and that the appeal should therefore be dismissed.

The rule has been framed and adopted for a useful and important object—the saving of the multiplication of actions, with the attendant costs, in cases where one action would serve to determine the rights of a number of persons in a question with another party called as defendant. A series of different actions one after another by different plaintiffs is to be no longer necessary in cases where numerous persons have "the same interest in one cause or matter," for in such cases "one or more of such persons may sue on behalf or for the benefit of all persons so interested." The rule is obviously one of advantage not only to plaintiffs but to defendants also, in the way of saving multiplication of suits, and it is of much importance to note, as observed by my noble and learned friend Lord Macnaghten, that it only applies the practice of the Court of Chancery, of which he gives many instances, to all divisions of the High Court.

Have not, then, the plaintiffs stated a case in which they have all "the same interest" in the cause or matter or in each of the different matters which are the subject of this action? It seems to me, on examination of the claims and the plaintiffs' statements in support of these claims, that they have stated such a case. In order to shew that this is so I do not think it necessary to go into much detail.

The original right to the market was conferred by letters patent to the Earl of Bedford a great many years ago, and was

the subject of an Act of the 53rd year of His Majesty King George III. In 1828 the 9 Geo. 4, c. 113, the provisions of which are founded on by the plaintiffs, was passed. That statute recognises and specifies various classes of permanent stands of the market under the different heads of "Casual cart stands," "Yearly cart stands," and "Yearly pitching stands," and by its enactments confers important and valuable privileges to the use of such stands on a class of persons designated as "the growers of fruit, flowers, vegetables, roots or herbs," at certain rates scheduled in the Act. These privileges, which are not said to have been abrogated, appear to entitle such growers to rights of priority in the occupation of the stands for the purposes of their business, and that at the rates there specified.

Now, it is alleged in the record by the plaintiffs (1.) that they are the growers of fruit, flowers, vegetables, roots, and herbs within the meaning of the statute; (2.) that the defendant, the present Duke of Bedford, refuses to give them and other "growers" the privileges of the occupation of the various classes of stalls to which they have right under the statute; and (3.) that when they do get such occupation the rates charged exceed those allowed by the statute. For the purpose of the present preliminary point, of procedure only, these statements must be taken to be true, and on this assumption the question raised is, Does the rule of Court apply to the action? In the trial questions may arise as to whether the plaintiffs are, within the meaning of the statute, "growers of fruit, flowers, vegetables, roots, or herbs" as they allege. The statute was passed long before railways were used, and when the carriage of flowers, fruit, and vegetable produce in quantities to market was made by carts and wagons; but the plaintiffs, who allege they are such "growers" as the statute describes, are each, according to their statement, in the occupation of land in the county of Middlesex, who have been frequenters of the market for business purposes, and there is no reason to doubt the title of each to sue on his own account. Then, all of the plaintiffs make the same claims—claims to the exercise of the same rights and privileges which the appellant refuses to recognise—

H. L. (E.) 1900 BEDFORD (DUKE OF) v. ELLIS. Lord Shand.

and all of them rest their claims on the same ground, namely, the statutory provisions of privileges in their favour as such growers as they describe themselves to be.

This is, I think, apparent from the plaintiffs' statements 8 and 9, in regard to the "casual cart stands," the "yearly cart stands," and the "yearly pitching stands," and the tolls exacted by the defendant for the use of these. The plaintiffs in their character of "growers" claim statutory preferential rights to the occupation and use of these, and allege that the defendant refuses to give them such preferential use, and "makes it a practice either to refuse to growers the use of such stands, or by filling such stands, with others than growers, to prevent growers having the use of such stands, with the result that growers have to go to other parts of the market or to places outside the market, or to the public streets, where the restrictions contained in the said Act not being applicable the defendant charges higher rates than would have to be paid under the Act, and with the further result of injury to growers in their trade." These statements seem to me to amount clearly to an averment not only of the existence of preferential rights, and of the same or substantially the same preferential rights in all the plaintiffs, but to a charge against the appellant that he violates these rights, or refuses to give effect to them, and it follows that the plaintiffs have the same interest in the cause or matter of the complaint. There is no difference in their claims. They all ask the same remedy, which it is unnecessary to specify further than to say they all claim to have a declaratory decree by the Court which shall give effect to their statutory privileges the same in the case of each of them, as growers of fruit, flowers and vegetables, and an injunction to restrain the appellant from doing any act contrary to such declaratory decree. There is thus one cause or matter only in which all of the plaintiffs have an interest, and in which other "growers" have the same interest, as disclosed in the record, that matter being the disregard by the defendant of their statutory privileges, for which accordingly one and the same remedy in the form of the different heads of claim is asked. To that case the rule in question seems to me in its terms directly to apply, and accord-

ingly the objection to the competency of the action is, I think, unfounded.

There is one head of the claim (the seventh) as to which there was not much said in the appellant's argument, which is no doubt in a different position; I mean a claim by each of the plaintiffs for repayment to him of alleged excess charges for six years for market accommodation. This is a subsidiary matter, and it is not a claim made "on behalf of all other the growers of fruit, flowers," &c., to which alone the appellant's objection to the representative character of the action applies. The real cause or matter in dispute and raised by the statement and claims is the nature and extent of the privileges of the plaintiffs to the use of the market stands, and to the effect of determining this the action is competent. This being so, it will be found convenient to both parties to have the subsidiary matter of excessive charges made against each plaintiff determined in the same cause; and I do not see any ground for holding that it is incompetent to do so.

The judgment of Romer L.J. proceeds on the view that the plaintiffs in any action seeking the benefit of the rule in question must allege and possess some "proprietary" right which it is their joint object to vindicate. This is clear throughout his Lordship's judgment, which is founded on what was said by my noble and learned friend Lord Lindley, as Master of the Rolls, in the case of *Temperton* v. *Russell*. (1) At the beginning of his judgment Romer L.J. says expressly that, as pointed out in *Temperton* v. *Russell* (1), the rule "only extends to cases where the class have or claim some beneficial proprietary right which is being asserted or defended. I have therefore to consider whether the growers in question as a class have or claim a beneficial proprietary right under the above Act which is being asserted in this action." He immediately adds: "I am unable to come to the conclusions that the growers as a class have any proprietary rights in respect of the market," and his judgment proceeds on the ground that the absence of "proprietary" rights excludes the application of the rule. In effect it appears to me that the judgment of Vaughan

(1) [1893] 1 Q. B. 435.

H. L. (E.) 1900 BEDFORD (DUKE OF) v. ELLIS. Lord Sband.

Williams L.J. is founded on the same view, for he observes that the plaintiffs allege that the Act gives them "certain preferential rights constituting some sort of proprietary interest in them," and holds that this is not given by the statute. But if his Lordship proceeded on the view of the absence of an interest in common in the plaintiffs I cannot agree with him; and the judgment of Lord Hatherley, in the case of Warrick quoted by Lord Lindley, is I think a direct authority on the point, contrary to the view of the Lord Justice.

The case of *Temperton* v. *Russell* (1) was not an action founded on any alleged right claimed by the plaintiff such as the plaintiffs here allege. The action was one of tort, and a number of trades unions or societies called as defendants by one plaintiff were charged with maliciously procuring workmen to break their contracts with the plaintiff, with enticing workmen from his employment, and with intimidating workmen in his service, while the defendants were sued "not only on their own behalf" "but as representing all the members" of their various societies. The Court refused to allow these last words to remain in the complaint, to the effect of making the action a representative one as regards the defence. It is true that in that case Lord Lindley used the expression on which Romer L.J. proceeded in his judgment in this case that the rule in question only extends to cases where the class have or claim some beneficial "proprietary" right which is being asserted or defended. In my judgment this expression unduly limits the application of the rule, and was unnecessary for the decision of the case of tort then under the consideration of the Court; and Lord Lindley evidently did not contemplate that the rule should not include such a case as the present, for his Lordship has held, in his judgment, that the rule does apply in this case. There is no such word as "proprietary" in the rule, and no good reason in my opinion for holding that word by implication to be a part of the rule. The sole test to be applied is that of "the same interest" in one cause or matter. The order in my opinion applies equally to the case such as occurs here, where the plaintiffs seek to enforce a disputed personal

(1) [1893] 1 Q. B. 435.

right or rights common to all of them by gaining or vindicating possession of a valuable privilege, as it does when, being in possession of a privilege, the plaintiffs seek to enforce a possessory right in a question with a trespasser or a third party in some way injuring their possession itself by opposition to its exercise.

LORD BRAMPTON. My Lords, under the Covent Garden Improvement Regulation Act (1828) the area of Covent Garden Market, as described in the preamble of the Act, was rearranged according to a plan therein referred to, and the several portions thereof were appropriated as directed by the Act, and sets of stands were marked out or erected for the accommodation of carts, &c., bringing fruit, flowers, vegetables, roots or herbs to the market, and for the reception, exposure for sale, and sale of such fruit, &c.

For the purposes of the present question it will not be necessary to refer in detail to more than three of such sets of stands, namely, those described in the Act and indicated on the plan respectively by the letters B, C, F and G.

B signifies what are in the Act called "the casual cart stands," C "the yearly cart stands," and F and G "the yearly pitching stands." The uses to which each set of stands was exclusively appropriated are mentioned and described in s. 7 of the Act.

B was exclusively appropriated to the reception of wagons and carts in which fruit, &c., shall be brought to the market for sale, and for the exposing to sale and selling such fruit, &c., on the stand to which it shall be brought; it being further enacted that the growers of fruit, &c., shall be deemed to be the persons having the preferable right to resort to such stands.

C shall be exclusively appropriated to the reception of wagons and carts of or belonging to growers of fruit, &c., and to the exposing for sale and selling the fruit, &c., grown or raised by such growers, and be let by the owners of the market, by the year or for any shorter period at such yearly or other rents, &c., as are mentioned in the schedule, and the person to whom any such stand shall be let shall be deemed to be

H. L. (E.) 1900

BEDFORD (DUKE OF) v. ELLIS.

Lord Brampton.

the holder thereof, and the person having the preferable right to resort thereto.

F and G shall be exclusively appropriated to exposing to sell and selling fruit, &c., and may be let by the owners of the market exclusively to growers of fruit, &c., by the year, or for any shorter period, and the person to whom any such stand shall be let shall be deemed to be the holder thereof and the person having the preferable right to resort thereto.

Subject as regards the use of each of these stands to the rents, tolls, or sums of money mentioned in the schedule to the Act.

Each of the respondents, who are the plaintiffs in the action, claims to be a grower of fruit, flowers, vegetables, roots and herbs within the meaning of the Act, and a frequenter of the market for the sale thereof, and as such they sue in this action on behalf of themselves severally and all others the growers of fruit, &c. It is essential to the right understanding of the question before your Lordships, namely, whether, as the record now stands, all the six plaintiffs are according to the practice and procedure of the courts entitled to sue in one action, not only in respect of their own separate and several alleged causes of action, but also on behalf of all other growers of fruit, &c., by reason of the alleged illegal conduct of the defendant in non-compliance with any of the provisions of the Act, that I should state what are the several grievances complained of in the claim. I shall then be in a condition to point out, first, the objections which I think exist to allowing all these six plaintiffs to sue together and join in this action, and then the reasons why I think that the representative right of the six plaintiffs to sue on behalf of other growers not parties to the record ought to be limited, and to what extent.

The first seven clauses of the statement of claim are merely introductory averments. The charging part of the claim commences with paragraph 8, which is nothing more than a general complaint that the defendant does not in his management of the market comply with the provisions of the Act, and in particular with reference to the casual cart stands B, the yearly cart stands C, and the yearly pitching stands F and G, and the

tolls exacted by the defendant for the use of these stands. Paragraph 9 submits that the defendant has not the right to admit others to the use of the casual cart stands so long as growers present themselves and require the use thereof; but that he makes it a practice either to refuse the use of such stands, or, by filling them with others than growers, prevents growers from having the use of them, with the result that they have to go to other places where they have to pay higher rates.

In neither of these two paragraphs, 8 and 9, is any cause of action stated to exist in either of the plaintiffs in respect of the casual cart stands, nor is it alleged that the plaintiffs jointly, or either of them individually, ever sustained any damage by such alleged misconduct.

Paragraph 10 complains that each of the four plaintiffs—Ellis, Gray, Miller and Ashby—has applied to the defendant for a tenancy of a yearly cart stand, and in each case a tenancy has been refused, no objection being made to either as a proper tenant. It then alleges habitual misconduct of a similar character towards growers generally, naming none, with similar resulting damages, and avers that the defendant has stated his practice to be not to let such stands. I will assume for the purposes of this case that this paragraph does state a cause of action in each of these four respondents; but, as I read the paragraph, it is in each a separate cause of action, and not a joint cause of action in the four.

Paragraph 11 sets forth a similar character of grievance with reference to applications by the remaining two of the plaintiffs, Pullinger and Peacock, for tenancies of yearly pitching stands, averring that it is the practice of the defendant to refuse such tenancies, and by such refusals, and filling up the stands with others than growers, he interferes with the preferential right of growers with similar prejudicial results. In the case of these last two plaintiffs also the causes of action are several and not joint.

Then follow seven paragraphs (12, 13, 14, 15, 16, 17, 18), the 12th stating generally that unlawful and excessive tolls beyond those in the schedule have been charged—and to each of the

H. L. (E.) 1900

BEDFORD (DUKE OF) v. ELLIS.

Lord Brampton.

plaintiffs—but it is not alleged that such excesses have been made in respect of their positions as growers.

Each of the remaining six clauses of the set is devoted to a separate series of alleged illegal overcharges made on each of the six plaintiffs, and claims for repayment; but those are purely separate charges not affecting anybody except the individual overcharged, and with which neither of the other plaintiffs nor the other growers have anything to do.

Paragraph 19, the last, discloses no cause of action in either of the plaintiffs, but alleges general misconduct and mismanagement when the market is full, and traders are compelled to expose their goods on places where charges are not so reasonable.

The claims in the first five paragraphs are for declarations as to what the defendant is not entitled to do in respect of each of the matters above referred to; in the sixth for injunctions, and in the seventh for an account of the sums alleged to have been charged to and paid by each of the plaintiffs for six years past, in excess of, or other than the sums the appellant was entitled to charge, and for repayment thereof to each of the plaintiffs.

I cannot bring my mind to doubt that if the plaintiffs are entitled to prosecute this claim in its entirety, the defence will be fraught with a great deal of undesirable embarrassment. On the other hand I think that to set it aside altogether would be to defeat the well-established procedure of the Court of Chancery, under which plaintiffs suing to uphold a legal right by a suit in equity might sue on behalf not only of themselves, but also of all others having a community of interests in the upholding of that right, and would defeat also the objects contemplated by the rules referred to made since the Judicature Act with a view to harmonise the proceedings and allow of representative actions in both divisions of the High Court of Justice. For this reason it is that I find myself unable altogether to agree in the judgment either of Romer J. or of the Court of Appeal.

Before proceeding to deal with more debatable matters, I will at once express my opinion that the right of the plaintiffs

to sue on behalf of other growers as well as for themselves does not depend upon the question whether such other growers have proprietary rights in respect of the market, for if they have as a class any beneficial rights or interests in the market, though not strictly of a proprietary character, they may well be represented by those suing to obtain redress in respect of their individual grievances, provided there is community of interest in one right.

I would here observe that I fail to see the utility or necessity of making the Attorney-General a party to the proceedings; for the growers, although no doubt they form an important class of traders attending the market, do not represent the public.

I come now to the serious question whether all these plaintiffs are rightly joined in this action. As a fundamental rule of practice, and of pleading, two or more different plaintiffs, each having a separate and different cause of action, cannot be joined in the same action. To cite authority for this proposition seems superfluous. I may, however, mention the case of *Sandes and Another* v. *Wildsmith and Another* (1) as an illustration. Under this rule no two of the plaintiffs in this case could have been joined in this action; for the grievance of each as claimed is separate and distinct, and no joint cause of action is disclosed.

Another rule of practice and pleading would, before the Judicature Act, have prevented a plaintiff from suing in the Common Law Courts as representing anybody except himself, unless he were already a legal representative of another, e.g., an executor, public officer of a bank, &c., having special authority by law to sue on behalf of another or others. It was otherwise, however, in the Court of Chancery, as stated by the Master of the Rolls in giving judgment in this case in the Court of Appeal. Since the Judicature Act, however, two rules of the Supreme Court, Order XVI., rr. 1, 9, have been made, apparently with a view to assimilate the practice of the Common Law with the rules of Equity. The rules are as follows:—Rule 1: "All persons may be joined in one action

(1) [1893] 1 Q. B. 771.

H. L. (E.) 1900 BEDFORD (DUKE OF) v. ELLIS. Lord Brampton.

as plaintiffs in whom any right to relief in respect of, or arising out of the same transaction or series of transactions is alleged to exist, whether jointly, severally, or in the alternative, where, if such persons brought separate actions, any common question of law or fact would arise." Rule 9: "Where there are numerous persons having the same interest in one cause or matter one or more of such persons may sue or be sued [or may be authorized by the Court or a judge to defend] in such cause or matter on behalf or for the benefit of all persons so interested."

But it must be observed, according to my view, that neither the rule of equity, nor the rules I have just mentioned, authorize the joinder in the same action of two or more plaintiffs suing in respect of different causes of action, nor the suing by any plaintiff on behalf of another person as well as himself, except in respect of the one and the same interest in the cause or matter for which he is himself suing. Let me now apply what I have said to the several plaintiffs and matters of complaint in the present case.

As regards the first claim for a declaration as to the casual cart stands, though general non-compliance with the Act is alleged, no specific cause of action is stated or suggested in either of the plaintiffs in respect of them.

As regards claim No. 2, relating to the yearly cart stands, the four plaintiffs—Ellis, Gray, Miller, and Ashby—have undoubtedly stated separate causes of action, in respect of which they have jointly claimed a declaration; they have also claimed injunctions and separate accounts, and repayment of excessive charges. They clearly are rightly joined. The same common question would have arisen if they had brought separate actions. They are also entitled to sue on behalf of all other growers having the same interest in one cause or matter, that is to say, the preferential rights they claim to be accepted as tenants of yearly cart stands as described in s. 7 of the Act.

As regards the claim (3.) to a declaration touching the yearly pitching stands, I think the plaintiffs Pullinger and Peacock stand with regard to those stands precisely in the

same position as the other four plaintiffs stand with regard to the yearly cart stands. Their claims and the cause of action they are suing on are not the same as those of the other four plaintiffs, and had they brought separate actions, the same common questions would not arise, for the two sets of plaintiffs sue not in respect of the same, but of different claims, that is, preferential rights to the occupation of different stands, and the obligations upon the defendant as to the letting of which are not couched in the same language. As to the "yearly cart stands," the words relied on as making it obligatory to let are "shall be let," but there are no words expressive of any obligation to let to a grower, and the preferable right to resort to the stand is given not "to growers," but to "the holder of the stand," while as to the yearly pitching stand the words are "may be let," and it is expressly directed that, if let, it shall be "to growers." As a test whether these several claims are substantially different, I would ask, assume a judgment to be recovered by any of the plaintiffs against the defendant in respect of the "yearly cart stands," and subsequently an action to be brought by the same plaintiffs against the defendant in respect of the "casual cart stands," could the defendant plead judgment recovered? I do not think any one could be found who would answer in the affirmative. This seems to me to prove to demonstration that the rights and causes of action are different. I think, for the reasons I have expressed, that the rights of Ellis, Gray, Miller, and Ashby are different, and relate to other stands than those as to which Pullinger and Peacock claim to be entitled to tenancies, and that they ought not to be joined in one action, and that the claim ought to be amended by striking out all relating to one of these two sets of plaintiffs, and also to the casual cart stands, but the claim ought not to be set aside altogether. I think, moreover, that the interests of the growers would be equally well settled by leaving as plaintiffs only one set as I have suggested, and certainly the embarrassment would be reduced to a minimum.

Unless such an amendment is made, I think the judgment of the Court of Appeal should be reversed.

H. L. (E.) 1900 BEDFORD (DUKE OF) v. ELLIS.

THE LORD CHANCELLOR. My Lords, I have nothing to add to what I said when this case was last before the House, and I therefore proceed to ask your Lordships to pronounce judgment.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, December 10, 1900.

Solicitors: *R. S. Taylor, Son & Humbert; A. B. Bell.*

[HOUSE OF LORDS.]

H. L. (E.) 1900 Dec. 10.

THE LONDON COUNTY COUNCIL AND OTHERS . . . . . } APPELLANTS;

AND

THE ATTORNEY-GENERAL . . . RESPONDENT.

Revenue—Income Tax—Deduction of Income Tax from Interest or Annuities—Customs and Inland Revenue Act, 1888 (c. 8), s. 24, *sub-s.* 3.

In paying the dividends on their consolidated stock out of the Consolidated Loans Fund, the London County Council are bound under s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, to account to the Crown for the income tax which they deduct from the dividends, so far only as the dividends are not paid out of their income which has already been charged with income tax.

Where the dividends are paid partly out of rents and profits from their lands charged with income tax under Sched. A, partly out of interest on loans to local authorities charged with income tax under Sched. D, and (where those receipts are insufficient) partly out of moneys raised by rates, the council are entitled to retain for their own benefit so much of the deduction for income tax which they make on the dividends as is equal to the income tax paid both under Sched. A and Sched. D.

The decision of the Court of Appeal, [1900] 1 Q. B. 192, reversed.

UNDER various statutes the London County Council, as successors to the Metropolitan Board of Works, raise money by loans upon the security of the Consolidated Loans Fund. They also lend money to local authorities, the interest on which and the parts of principal repaid are paid into the Consolidated

Loans Fund. Between April 1, 1897, and September 30, 1898, the London County Council paid (in round numbers) 1,600,000*l.* by way of dividends on consolidated stock and interest upon loans made to the council. That sum was paid by the council partly out of their rents and profits of lands charged with income tax under Sched. A, partly out of interest received on their loans to local authorities and other interest or annual payments charged with income tax under Sched. D, and partly (that is to the extent to which such receipts were insufficient) out of sums raised by rates. The council deducted and retained income tax upon the dividends and interest paid by them so far as they were paid (1.) out of their rents and profits on lands charged with income tax under Sched. A, and (2.) out of interest received on loans or otherwise charged with income tax under Sched. D, and contended that they were entitled to do so under the Income Tax Acts, 1842 and 1853, the Customs and Inland Revenue Act, 1888, particularly the rules in s. 60 of the Act of 1842, s. 40 of the Act of 1853, and s. 24 of the Act of 1888. So far as the dividends and interest were paid out of moneys raised by rates the council accounted for income tax to the commissioners.

The Attorney-General filed an information against the council, their chairman, Lord Welby, and their clerk, C. J. Stewart, in which the material parts of the statutes were stated. These paragraphs of the information are set forth in the report below (1), where also the Treasury regulations and an account of the receipts and payments are given.

In paragraph 9 of the information the Attorney-General charged that none of the said dividends are by law payable out of profits or gains brought into charge to the income tax under Sched. D, and that the whole of the sums deducted as aforesaid are payable to and should be accounted for to Her Majesty by the defendant council.

In the Divisional Court the Crown abandoned paragraph 9.

In paragraph 10 the Attorney-General alternatively alleged and charged as follows: The said consolidated stock and the dividends thereon are, by virtue of the said Act of 1869 and the

(1) [1900] 1 Q. B. 192.

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL.

subsequent Acts, made a charge upon the lands, rents, and property belonging to the defendant council and their predecessors, the said board, under the Acts mentioned in the 1st schedule of the said Act of 1869, and on all moneys, whether in the nature of capital or otherwise, arising from the sale, lease, or other disposition of lands, rents, and property belonging to the defendant council, and upon all sums received by the defendant council from the divers local authorities, to whom they have made loans under the statutes above referred to, in respect of interest on or the principal of such loans, and on all moneys which can be raised by the council by rates under the said Act of 1869; that the only parts of the said fund which can be brought into charge to the income tax under Sched. D of the Income Tax Acts are the interest received on loans to the said local authorities; that it is consequently only a rateable proportion of the said dividends on the said consolidated stock which can be regarded as being payable out of profits and gains brought into charge to the income tax under Sched. D, that is to say, a proportion corresponding to the proportion in which the said interest on loans to local authorities is legally applicable and applied to the payment of the said dividends on consolidated stock, and that the defendant council is bound to pay over to Her Majesty all the income tax deducted by them save that deducted on such rateable proportion as last aforesaid.

In paragraph 11 the Attorney-General, by way of a further alternative, alleged and charged as follows: The said Consolidated Loans Fund has only one constituent portion which is chargeable to the income tax under Sched. D. of the Income Tax Acts, namely, the said interest paid to the defendant council by local authorities on the loans made to them and no other constituent so chargeable, and that such Consolidated Loans Fund is by law applicable in the first place to the payment of dividends on consolidated stock and loans to the defendant council, and then in purchasing and redeeming consolidated stock and the payment of the other matters enumerated in s. 15 of the said Act of 1889, that a rateable proportion only and no more of the said interest payable by

the said local authorities is applicable and applied to the payment of dividends on the said consolidated stock and loans to the defendant council, and that therefore no part of the dividends paid by the defendant council, excepting only an amount thereof equal to the said rateable proportion of the said interest, is payable out of profits or gains brought into charge to the income tax under Sched. D, and that the defendant council ought to deduct and to account to Her Majesty for the whole of the income tax on the said dividends, excepting only the tax on the amount equal to the said rateable proportion of the said interest.

The information prayed for orders, declarations, and inquiries accordingly.

The Divisional Court (Day and Lawrance JJ.) made a declaration in accordance with paragraph 11 of the information and an order for inquiries and accounts accordingly, with costs. (1) The Court of Appeal (A. L. Smith, Collins, and Vaughan Williams L.JJ.) affirmed this decision with costs. (2) The county council appealed.

By the Customs and Inland Revenue Act, 1888 (c. 8), s. 24, sub-s. 3, "Upon payment of any interest of money or annuities charged with income tax under Sched. D, and not payable, or not wholly payable, out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be; and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly. . . ."

July 23, 24, 26. *Sir E. Clarke, Q.C.*, and *Jelf, Q.C.* (*Ryde* with them), for the appellants. The appellants in fact apply the whole of the interest and rents received by them to the payment of dividends on their consolidated stock. Deductions

(1) [1899] 2 Q. B. 226. (2) [1900] 1 Q. B. 192.

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL.

have been made from the amounts so received by the appellants, and they are entitled to corresponding deductions in paying their dividends; otherwise they would be paying twice over. There is no ground for the distinction made by the Court of Appeal between Sched. A and Sched. D. There is only one tax, and the schedules constitute not separate imposts, but one tax under several heads. It is erroneous to speak of income tax under Sched. D. Further, the Customs and Inland Revenue Act, 1888, is not a taxing but a regulative Act, the taxing Acts being only those of 1842 and 1853. But the Court of Appeal have wrongly construed s. 24, sub-s. 3, of the Act of 1888. They have read the sub-section as though after "brought into charge to such tax" there were the words "under Sched. D." The money received from rents as much as the money received as interest on loans was "brought into charge." There is nothing in the Act of 1888 to alter the law. Its object was simply to make the net finer, not to make anybody pay tax twice. The council have not received their rents in full: both the moneys from which deductions have been made under Sched. D and those subjected to deductions under Sched. A are transmitted to the stockholders, and the council is only a conduit pipe. Sect. 104 of the Act of 1842 provides for deductions in "any interest of money, annuity, or other annual payment," which clearly includes rent: see Dowell's Income Tax Laws, 4th ed. p. 150, and *Coltness Iron Co.* v. *Black* (1), per Lord Blackburn. The decision below is inconsistent with *Gresham Life Assurance Society* v. *Styles.* (2)

The claim for rateable deduction in paragraph 10 is as new and unprecedented as it is contrary to principle and reason, and as untenable as the wanton claim in paragraph 9.

Sir R. B. Finlay, A.-G., and *Danckwerts, Q.C.* (*Rowlatt* with them), for the respondent. It is not correct to say that there is one tax only, the income tax. The Act of 1842 speaks in the preamble of "the several rates and duties mentioned in the several schedules contained in this Act and marked respectively, A, B, C, D, and E." The separation is maintained

(1) (1881) 6 App. Cas. 315, at p. 330. (2) [1892] A. C. 309, 314.

throughout that Act: ss. 3 and 22. There are thus five different taxes; and s. 60 speaks of "the duties hereby granted." There are broad distinctions between the duties under the several schedules; and the duty under Sched. B is in addition to that under Sched. A; thus there are two duties payable in respect of the same thing. Sched. C is also kept separate: s. 88. These are taxed at the source, and no such enactment as the Act of 1888 was needed. *Gresham Life Assurance Society* v. *Styles* (1) was before the coming into operation of the Customs Act, 1888. The observations of the Lord Chancellor (2) and Lord Watson (3) are adverse to the appellants' claim. "No deduction," says Lord Watson, shall be "made on account of any annual interest or any annuity or other annual payment 'payable out of such profits or gains.'" The fundamental distinction between the other schedules and Sched. D is pointed out by Lord Penzance in *Coltness Iron Co.* v. *Black.* (4) The words "annual value," he says in the case of property, "are introduced into the statute, not as the subject of taxation, but only as the measure of the taxation, to which the 'property' shall be subjected." Gross value is made the measure of assessment under Scheds. A and B, and is wholly different from rateable value: Valuation of Property (Metropolis) Act, 1869, s. 45; *Dobbs* v. *Grand Junction Waterworks Co.* (5) Complete machinery existed, apart from the Act of 1888, for proper deductions under Scheds. A and C. The like system of classification and distinction between the several schedules is observed in the Act of 1853, s. 2. But in truth this is not really a tax on the county council, who under the Act of 1888 are simply collectors. The tax itself is chargeable not only on income, but on capital, and the Treasury regulations are merely for bookkeeping purposes.

Upon the construction of s. 24 of the Act of 1888, the council must account to the Crown for all income tax deducted by them except such as was deducted from interest paid out of profits or gains brought into charge to tax under Sched. D.

(1) [1892] A. C. 309, 314.
(2) [1892] A. C. at p. 314.
(3) [1892] A. C. at p. 319.
(4) 6 App. Cas. at p. 327.
(5) (1883) 9 App. Cas. 49.

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL.

The landlord receives and the tenant pays wholly under Sched. A. In the case of mortgagor and mortgagee, the Crown allows as matter of practice the mortgagor to deduct from the interest. But the mortgagee is still liable.

[LORD DAVEY referred to s. 40 of the Income Tax Act, 1853, which allows deductions in respect of rent, interest, &c., and which applies both to A and D.]

Under Sched. A the deductor retains for his own benefit, whereas under C and D the retention is on behalf of the Crown. But the words of s. 24, sub-s. 3, of the Act of 1888 are plain: they are, "brought into charge to such tax," and the antecedent to "such" can only be "income tax under Sched. D." The construction of the appellants could only be sound if the words were "the tax" or "income tax." The reason for the distinction is that the tax is not the same under the several schedules: there is no reason why A and D should be the same; as B is always different.

[They also referred to *Leeds Building Society* v. *Mallandaine*. (1)]

Further, the interest on the consolidated stock being charged on the whole of the property of the council and their rates, the interest ought to be apportioned rateably over the whole, and only a rateable proportion deemed to be paid out of the rents and interest on loans.

Sir E. Clarke, Q.C., in reply, referred to *Mersey Docks and Harbour Board* v. *Lucas*. (2)

The House took time for consideration.

Dec. 10. LORD MACNAGHTEN. My Lords, acting under statutory authority, the Metropolitan Board of Works and the London County Council, as their successors, have from time to time raised money on loan by the creation and issue of stock known as Metropolitan Consolidated Stock. This stock, and the dividends upon it and the sums required to form a sinking fund, are charged "indifferently" on the whole of the lands, rents, and property belonging to the council, and, in addition to the

(1) (1895) 3 Tax Cases, 577. (2) (1883) 8 App. Cas. 891.

benefit of this charge, the stockholders have the security of the rates.

For the financial year 1897–8, the year to which your Lordships' attention was specially directed, the dividend on Metropolitan Stock amounted in round figures to 1,140,000*l.* On the other hand, in that year the council received about 100,000*l.* in rents, and about 500,000*l.* for interest on authorized advances to other public bodies. The balance required to make up the dividend was raised by rates. In their return to the Commissioners of Inland Revenue the council charged themselves with income tax on the proceeds of rates applied towards the payment of the dividend, but they claimed exemption in respect of the rest of the money so applied as having been paid out of profits or gains already brought into charge. The commissioners disallowed the claim. They insisted that the council was bound to pay over the amount of income tax deducted from interest on Metropolitan Stock so far as the deduction was made out of moneys not brought into charge under Sched. D; it was no answer to say that the moneys had been brought into charge under some other schedule. That was the principal question in the controversy before your Lordships.

There was another point raised on behalf of the Crown which I confess I do not quite understand. It was seriously argued that, inasmuch as the holders of Metropolitan Stock have a charge on all the property of the council—capital and income alike—for their interest as well as for their principal, and might in case of default resort to any and every item comprised in their security, therefore it would be right and proper before default, and merely for the purpose of computing income tax, to treat the dividend on Metropolitan Stock as paid rateably out of the capital of the property belonging to the council and the different branches of their income. That is an ingenious, but not, I think, a very businesslike suggestion. It is enough to say that it is the plain duty of the council, not being beneficial owners of the funds which they administer, to keep down annual charges out of annual income as far as it will extend, and not perhaps the less so because the instructions of the Treasury, under whose financial control they are placed, require

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL. Lord Macnaghten.

them to keep accounts distinguishing capital from income. The return to which I have already referred shews that the council has dealt with the matter properly. I cannot see that there is anything calling for further inquiry. I pass from that point. It is not, I think, open to argument. I cannot say as much for the principal matter in dispute. That involves the construction of a modern Act of Parliament.

The question depends upon the meaning and effect of sub-s. 3, s. 24, of the Customs and Inland Revenue Act, 1888, which enacts that "upon payment of any interest of money or annuities charged with income tax under Sched. D and not payable or not wholly payable out of profits or gains brought into charge to such tax," the rate of income tax in force at the time shall be deducted and an account rendered to the Commissioners of Inland Revenue "of the amount so deducted or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be." And then the amount deducted is declared to be a debt due to the Crown and recoverable accordingly.

It will be observed that there is a change of language, and that the word "paid" takes the place of the word "payable" which occurs in the earlier part of the sentence. The result, therefore, is that so far as interest of money or annuities chargeable under Sched. D are in fact paid out of profits or gains "brought into charge," whether in law payable thereout or not, the person who makes the payment and deducts the rate of income tax is not accountable to the Crown for the duty deducted.

The difficulty whiah has given rise to the present claim on the part of the Crown is created by the use of the words "profits or gains brought into charge to such tax" in the earlier part of the sub-section, and the words "profits or gains brought into charge" in the latter part. What is the meaning of "such tax"? And what is the meaning of "brought into charge"? The Divisional Court and the Court of Appeal have both held that the expression "such tax," referring back to the foregoing words, means "income tax under Sched. D," and that the expression "profits or gains brought into charge" in the latter

part of the sub-section means "profits or gains brought into charge under that schedule," and not "profits or gains brought into charge by virtue of the Income Tax Acts."

Now, if one had to construe the enactment with nothing but the words of the sub-section to go upon, ignoring the state of the law at the time when the enactment was passed, and supposing, as one might possibly suppose from the language used, that there was a special or peculiar sort of income tax which could be properly described as "income tax under Sched. D," still I think it would be difficult to give any satisfactory reason why the expression "such tax" should mean "income tax under Sched. D" rather than "income tax" simply, or why the expression "brought into charge" should be limited to what is brought into charge under one particular schedule. But the sub-section in question, as the Act itself declares, is introduced by way of amendment. And how can you understand the true meaning and effect of an amendment unless you bear in mind the state of the law which it is proposed to amend? It is necessary, therefore, to take a wider survey, and then, I think, the meaning of the enactment becomes plain enough. I cannot help thinking that the advisers of the Crown have somewhat misapprehended the scope and leading principles of our income tax legislation and have not paid sufficient attention to the state of the law at the time when the Act of 1888 was passed. The consequence is that now, when the Act of 1888 has been in force for a number of years, it is discovered that a provision described in the Act as an "amendment" has worked a radical change in the law.

Income tax, if I may be pardoned for saying so, is a tax on income. It is not meant to be a tax on anything else. It is one tax, not a collection of taxes essentially distinct. There is no difference in kind between the duties of income tax assessed under Sched. D and those assessed under Sched. A or any of the other schedules of charge. One man has fixed property, another lives by his wits; each contributes to the tax if his income is above the prescribed limit. The standard of assessment varies according to the nature of the source from which taxable income is derived. That is all. Sched. A contains

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL. Lord Macnaghten.

the duties chargeable for and in respect of the property in all lands, tenements, and hereditaments capable of actual occupation. There the standard is annual value. It is difficult to see what other standard could have been adopted as a general rule. But there again, if the subject of charge be lands let at rack-rent, the annual value is "understood to be the rent by the year at which the same are let." In every case the tax is a tax on income, whatever may be the standard by which the income is measured. It is a tax on "profits or gains" in the case of duties chargeable under Sched. A and everything coming under that schedule—the annual value of lands capable of actual occupation as well as the earnings of railway companies and other concerns connected with land—just as much as it is in the case of the other schedules of charge. And it is to be observed that the expression "profits or gains" which occurs so often in the Income Tax Acts is constantly applied without distinction to the subjects of charge under all the schedules. I need not trouble your Lordships by giving instances of this use of the expression, because I shall presently have occasion to call your Lordships' attention to a section in the Act of 1842 in which it so happens that the expression "profits or gains arising from lands, tenements, hereditaments, or heritages" is used to denote the annual value of lands capable of actual occupation brought into charge under Sched. A. I will only refer in passing to one rather striking example. The "general declaration" required by the Act of 1842, s. 190, Sched. G, XV., is described as "general declaration by each person returning a statement of profits under Scheds. A, B, D, or E."

Unfortunately the learned judges of the Courts below took a very different view in regard to this point. That, I think, was the initial mistake. In the Divisional Court (1) the argument on behalf of the Crown as reported was this: "The tax under Sched. A is a tax on property and is totally distinct from income tax under Sched. D." It appears from the shorthand notes that that argument was adopted by the Court without any qualification. Indeed, the presiding judge seems to have

(1) [1899] 2 Q. B. 235.

held that "Sched. A" was "not part of the Income Tax Act." The passage is omitted in the regular reports, though it is really the key to the judgment. In the Court of Appeal the argument apparently was not put quite so high. But there is this observation in the leading judgment: "The tax under Sched. D is a tax upon 'gains and profits,' an entirely different tax from the tax under Sched. A." The other members of the Court agreed. With all deference, I do not think that that is a sound view of the Income Tax Acts.

It is interesting and, I think, instructive to trace the development of income tax legislation. A very clear account of it is to be found in Mr. Stephen Dowell's excellent work. I turn at once to the original Act—the Act of 1799, 39 Geo. 3, c. 13, as amended by 39 Geo. 3, c. 22. For the purpose of the tax the income for the current year of persons to be assessed was ranged under four divisions: "I. Income arising from lands, tenements, and hereditaments. II. Income arising from personal property and from trades, professions, offices, pensions, stipends, employments, and vocations. III. Income arising out of Great Britain. IV. Income not falling under any of the foregoing rules." In the form of return required from the taxpayer, which is given in a schedule, these four heads of income were represented by nineteen "cases," of which the first fourteen fell under Division I. The taxpayer had to return his total income under each and all of these cases. From this total income the taxpayer was allowed to make a great many deductions under various heads also specified in the schedule. There were deductions for rents of all sorts. There was a deduction for "annual interest for debts," whether "personal" or charged on property enumerated in the several "cases," a deduction for "allowance to children or other relations," and a deduction for "annuities." The total amount of deductions was to be subtracted from the total amount of income, and the difference was the "income chargeable." That general return, as Mr. Dowell observes, was regarded as the most objectionable feature in the income tax. By the Act of 1803, in lieu of a general return, particular returns of income from particular sources were required. That was the origin of

H. L. (E.)
1900
LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL.
Lord Macnaghten.

the five schedules of charge with which we are now so familiar. It was not that there was any difference in kind between the income arising from the different sources. The alteration was made in order to avoid disclosure of the taxpayer's circumstances. This new method was found to work so well that it has been continued in every Income Tax Act ever since. The Act of 1853, after imposing the duties of income tax by s. 1, distributes those duties in s. 2 among the different Scheds. A, B, C, D, and E, on the ground, as there stated, of convenience of classification and facility of collection.

Another departure was made in 1803 from the system adopted in the Act of 1799. The principle was established of taxing income at its source, and afterwards distributing the burden among those upon whose shoulders it ought to fall. Speaking generally, the deductions authorized by the Act of 1799 were prohibited altogether, and the taxpayer liable to an annual payment, whether payable out of any subject of charge or not, was authorized to deduct and retain the tax upon the payment which he was bound to make. And so the law stood when the Act of 1888 was passed.

I need not trouble your Lordships with a reference to all the provisions of the Income Tax Acts which authorize a person who has paid income tax on what is not really available income because it includes money which he has to pay over to someone else, to deduct and retain the tax upon that payment. But it is, I think, worth while to refer very briefly to ss. 102, 103, and 104 of the Act of 1842. In the Act of 1842 the charge upon annuities, yearly interest of money, and other annual payments, is not expressly included in Sched. D, where it was afterwards placed by the Act of 1853. It forms the subject of a distinct section. The charging section is s. 102. It extends to all annual payments. The charge is to be according to and under and subject to the provisions by which the duty in the third case of Sched. D may be charged. Then there is a provision that "in every case where the same shall be payable out of profits or gains brought into charge by virtue of this Act"—your Lordships will note those words; they extend to income chargeable under each of the five schedules—no assess-

ment is to be made upon the person entitled to the annual payment. The whole of the profits and gains are to be charged, and the person charged in respect thereof is entitled to deduct a proportional part of the duty when he comes to make the annual payment to which he is liable. In every other case the annual payment is charged with duty in the hands of the recipient. Then s. 103 imposes penalties on persons refusing to allow the deductions authorized by the Act. It is only material as shewing that these provisions with regard to annual payments extend to annual payments out of profits or gains chargeable under all the different schedules. Then comes s. 104—a curious section, and one rather clumsily framed. It provides that, when it is proved to the satisfaction of the Commissioners "that any annual payment shall be annually paid out of the profits and gains bonâ fide accounted for and charged by virtue of this Act at the rate and according to the rules specified in Sched. D," a certificate may be granted entitling the person so assessed, upon making the annual payment, to deduct a proportionate part of the duty; and then it goes on to say that "no such certificate shall be required when such payments are to be made out of the profits or gains arising from lands, tenements, hereditaments, or heritages, as before mentioned, or of any office or employment of profit, or out of any annuity, pension, stipend, or any dividend or share in such public annuities as are herein mentioned, but such deductions may be made without having obtained such certificate." So it came to this in the result, that a certificate was only required when the payment was to be made out of profits or gains chargeable under Sched. D.

A change was made by the Act of 1853 in ease of the taxpayer. Sect. 40 of that Act had the effect of dispensing with the certificate of the Commissioners altogether. It authorized "every person" liable to the payment of rent or yearly interest of money, or any other annual payment, on making such payment to "deduct and retain thereout" the rate of duty then payable. It is obvious that that enactment was not a sufficient protection for the Crown. It contained no provision for cases where the annual payment was made out of gains or profits

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL. Lord Macnaghten.

not brought into charge by virtue of the Act. And the person making the annual payment was not bound to make a deduction for income tax; if he did, he was apparently not bound to account to the Crown except in the case of payments out of rates under s. 102 of the Act of 1842. It was to stop this gap, as it seems to me, that the enactment now under consideration was passed. It was not intended, I think, to effect a revolution in income tax law.

Now, what has the Act of 1888 really done? It is no longer optional for a person who has to make an annual payment to deduct income tax. He is bound to make the deduction, and bound to pay over to the Crown the amount deducted unless the payment comes out of income which has already paid the duty. That is a substantial improvement, and a reasonable security for payment of duty in many cases where formerly it was liable to be evaded. But to read the enactment as imposing a double duty would be contrary to the whole scope of income-tax legislation, and whimsical in the highest degree, when you consider that the double burden would necessarily fall upon the fundholder, in whose case the collection of duty is certain, while a person chargeable under Sched. D would be expressly exempted from double duty.

It seems to me that the mistake comes from misreading sub-s. 3, and making a pause in the sentence at a wrong place, and so treating the words "income tax under Sched. D" as a compound expression, instead of connecting the words "under Sched. D" with "charged," to which they properly belong. When the enactment speaks of "interest of money or annuities charged with income tax under Sched. D," it does not refer to such interest or annuities as being charged with a special kind of income tax. There is really no such thing as income tax under Sched. D in that sense. The expression only means "assessed to income tax in accordance with the provisions of Sched. D."

It seems to me, therefore, that the contention put forward on behalf of the Crown cannot be maintained; and I am of opinion that the information must be dismissed with costs, both here and below, and I move your Lordships accordingly.

LORD DAVEY. My Lords, I had prepared the judgment which I am about to read before I had had the advantage of seeing that which has been delivered by my noble and learned friend Lord Macnaghten. There is necessarily some repetition in what I have written; but, with apologies to your Lordships for troubling you with the same matter twice over, I think it better, as we are differing from the Court below, to read my own judgment.

My Lords, I am against the contention of the Crown on both the points which have been argued. The enactment on the construction of which the case turns is the 3rd sub-section of s. 24 of the Customs and Inland Revenue Act, 1888; but in order to understand this section it will be proper to refer to a few sections of the earlier Income Tax Acts. By the 10th rule of s. 60 of the Act of 1842, which is applicable to Sched. A, it is provided (reading it shortly) that where any lands are subject or liable to the payment of (inter alia) any annual payment thereupon reserved or charged, the owner may retain the proportionate part of the tax out of such annual payment. The person entitled to receipt of the annual payment is bound to allow the deduction, and the owner is discharged of so much money as if the same had actually been paid to the person entitled to the annual payment. An annual payment of course includes interest reserved by the year on a mortgage, notwithstanding the suggestion of Mr. Danckwerts to the contrary. It has been continuously so construed by landowners, mortgagees, and the Crown, and if anything were wanted to make clearer that which was clear enough before, it will be found in the 11th rule, which makes special provision for the case of a mortgagee in possession who receives the rents and pays himself his own interest, allowing the amount of the tax on his interest to the mortgagor. Sect. 102 of the same Act brings the yearly interest of money, whether payable as a charge upon any property or as a reservation thereout, or as a personal debt or obligation, within the third case of Sched. D; but it is provided that where the same shall be "payable out of profits or gains brought into charge by virtue of this Act" (your Lordships will observe the language), no assessment is to be made

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL. Lord Davey.

upon the person entitled to such interest, but the whole of such profits or gains is to be charged with the duty upon the person liable to make the payment, and he is entitled to deduct the proportionate amount of the tax from the yearly interest, and is thereby discharged of so much money as such deduction shall amount unto. I construe the words "profits or gains brought into charge by virtue of this Act" as including all annual income charged with the tax under any of the schedules, and not as confined to profits charged under Sched D. This is, I think, the natural meaning of the words; and it is made clear by the terms of s. 104, enabling the commissioners to grant a certificate of the tax having been paid, and making such certificate a condition precedent to the deduction where the annual payment is made out of profits and gains "charged by virtue of this Act at the rate and according to the rules specified in Sched. D." Then follows a proviso in these terms: "Provided always that no such certificate shall be required where such payments are to be made out of the profits or gains arising from lands, tenements, hereditaments, or heritages as before mentioned, or of any office or employment of profit, or out of any annuity, pension, stipend, or any dividend or share in such public annuities as are herein mentioned, but such deductions may be made without having obtained such certificate."

Your Lordships will observe in passing the bearing which the language of these sections has upon one of the arguments addressed to us, of which more hereafter. It is not open to doubt, and was not disputed, that ss. 60 and 102 alike mean that the person paying the yearly interest may deduct and retain the amount of the tax for his own benefit, and the scheme of the Act is so far clear and is in favour of the tax-payer. It was, no doubt, considered that the real income of an owner of incumbered property, or of property charged, say, with an annuity under a will, is the annual income of the property less the interest on the incumbrance or the annuity; and the mortgagee or annuitant and the owner of the property are, in a sense, entitled between them to the income, and, therefore, the Crown receiving the tax on the whole income, in the first

instance, from the owner, has no further claim against the mortgagee or annuitant, on whose account the owner is deemed to have paid as well as on his own, or, in other words, the Crown under this Act cannot demand the tax twice over on the same income.

The only other section I need refer to is s. 40 of the Income Tax Act, 1853 (16 & 17 Vict. c. 34), by which persons liable to the payment of any yearly interest or other annual payment, either as a charge upon any property or as a personal debt or obligation, are empowered to deduct the income tax thereout.

I now turn to the section to be construed, which is in pari materiâ with and complementary to the earlier enactments. The words are, "Upon payment of any interest of money or annuities charged with income tax under Sched. D, and not payable or not wholly payable out of profits or gains brought into charge to such tax, the person by or through whom such interest or annuities shall be paid shall deduct thereout the rate of income tax in force at the time of such payment, and shall forthwith render an account to the Commissioners of Inland Revenue of the amount so deducted, or of the amount deducted out of so much of the interest or annuities as is not paid out of profits or gains brought into charge, as the case may be, and such amount shall be a debt from such person to Her Majesty, and recoverable as such accordingly."

I confess I should have thought the meaning of these words sufficiently plain when read with the earlier enactments. Their general effect is to make it compulsory on the person paying taxable interest of money (not payable out of income already taxed) to deduct the tax and account for it to the Crown (as in such a case he would be bound to do), instead of leaving the deduction to his option, as was done by s. 40 of the Act of 1853. But the singular thing is that the learned Attorney-General and his junior, while they tell us that this is a mere collecting section for improvement of the machinery of collecting the tax, and not a charging section, nevertheless give a construction to the words which seriously and materially increases the burden on the subject, and enables the Crown in the present case, and other similar cases, to claim payment of

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL. Lord Davey.

the tax twice over. They say that the words "brought into charge to such tax" mean "to income tax under Sched. D," and the section therefore applies to all interest charged upon or payable out of income not within that schedule. In other words, the effect (they say) of the section is to deprive the subject of the benefit of rule 10 of s. 60 and s. 102 of the Act of 1842. The incumbered owner of land or of property or income within Scheds. C and E must deduct the tax from his incumbrancer's interest, but pay it over to the Crown, instead of retaining it for his own benefit as previously he was entitled to do. One wonders why it has taken ten years or more to develop this view of s. 24 of the Act of 1888, which, if correct, must be immensely beneficial to the Crown.

In my opinion, this construction of the section is entirely wrong. Grammatically I think it wrong. I think that the words "charged with income tax under Sched. D" mean "charged under Sched. D with income tax," and the words "such tax" mean the tax which is called in the Act "income tax." It is said that the tax imposed on property within Sched. A is not strictly an income tax, because it is levied on the annual value of property and not on the profits received by the owner. That, no doubt, is so, and if one were writing a treatise on taxation it would be proper to refer to this distinction. But the question is, What do the words "income tax" mean in the language of the Legislature, and in this Act? I believe the expression is not used in either of the principal Acts of 1842 or 1853, but by the Short Titles Act, 1892, these statutes have received the title of "the Income Tax Acts" of 1842 and 1853. The first instance of the words being used by the Legislature of which I am aware is in the title of another Act of 1853, relating to deduction in respect of life insurance. But in an Act of 1856 (19 & 20 Vict. c. 80), for relieving Scottish landlords in respect of public burdens not borne by landlords in England, "income tax" is the expression used for describing the tax levied under Sched. A. And, not to weary your Lordships, the words may be found in all the subsequent Acts (which have been passed almost yearly) as describing the tax which is levied under all the five schedules without distinction.

In this Act of 1888, s. 24 is one of a group of sections collected under the heading of "income tax." By s. 23 it is enacted that there shall be charged, collected, and paid the following duties of income tax under all the five schedules. I come to the conclusion that the expression "income tax," in the language of the Legislature, is a generic description of the tax which is levied under all the schedules alike, and is so used in s. 24.

Again, it is said (if I understood Mr. Danckwerts rightly) that the expression "profits and gains" has a technical, or almost technical, meaning, as descriptive only of the taxable subjects comprised in Sched. D. No doubt from the nature of the case the word "gains" is more frequently, though not exclusively, used in Sched. D. But, unluckily for the argument, the word "profits" is the word selected by the Legislature for describing generally the subjects of taxation under the Income Tax Acts. The title to as well the Act of 1842 as that of 1853 is "An Act for granting to Her Majesty duties on profits arising from property, professions, trades, and offices." I have already drawn attention to the language of s. 102, and to the use of the words "profits or gains arising from lands, tenements, hereditaments, and heritages" in s. 104 of the Act of 1842. The truth is that the income tax is intended to be a tax upon a person's income or annual profits, and although (for conceivable and no doubt good reasons) it is imposed in respect of the annual value of land, that arrangement is but the means or machinery devised by the Legislature for getting at the profits. Comparing ss. 102 and 104 of the Act of 1842 with this section, I think the words "profits or gains brought into charge to such tax" are intended to be and are the exact equivalent of the words "profits or gains brought into charge by virtue of this Act" in s. 102. I am, therefore, of opinion that the words "profits or gains" are apt words, and the words chosen by the Legislature for describing not only the taxable subjects under Sched. D, but also those comprised in Scheds. A and B and the other schedules; and I hold that the London County Council are entitled to retain for their own benefit so much of the deduction made by them from the interest paid by them to

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL. Lord Davey.

their mortgagees in respect of income tax as is equal to the income tax paid by them on their real estate under Sched. A, or, which comes to the same thing, to account to the Crown only for the deducted income tax on so much of the interest as is not paid out of their income which has already been taxed.

On the second point I find it difficult to express myself with becoming respect. The contention is that as the interest on their consolidated stock is charged on the whole of the lands, rents and property belonging to the council and on their rates, such interest ought, for the benefit of the Crown, to be apportioned rateably over all the subjects of the charge, and only a rateable proportion deemed to be paid out of their income from rents or from interest receivable by them from their own debtors. The proposition has the merit of novelty. Admittedly there is no authority for it. The attention of your Lordships was not called to any statutory enactment directing any such procedure, or to any principle of law which prescribes it. On the contrary, the general principle of payment in due course of administration is to pay annual charges in the first place out of annual income. It is not required by the Income Tax Acts in order to raise the right of deduction and retention that the interest on annual payment shall be exclusively charged upon or payable out of profits or gains brought into charge. It is enough if the interest is charged upon or payable out of the taxable income, though there may be other subjects of charge. But the mortgagor cannot, of course, retain against the Crown more income tax than he has paid. One of the learned judges in the Court of Appeal seems to have thought the case might be different if the county council had made some appropriation of their funds, though it is difficult to see how any account-keeping by the debtor could alter the rights of the Crown. If such appropriation be wanted, I find it in the division of the account of the Consolidated Loans Fund into an income account and a capital account, pursuant to the regulations approved by the Treasury under the statutory powers.

I am of opinion that the judgment appealed from should be reversed, and that the information should be dismissed with

costs, and the respondent should also pay the costs of the appellants in the Court of Appeal and in this House.

LORD BRAMPTON. My Lords, I had commenced to write an independent judgment upon this important case, when I was afforded an opportunity of reading the opinions, already printed, of my noble and learned friends Lord Macnaghten and Lord Davey. The conclusion at which I had arrived coincided so exactly with theirs, that I felt it to be unnecessary to trouble your Lordships with an elaboration of my own views. I am content to say that I entirely agree in the judgments they have just delivered.

LORD ROBERTSON. My Lords, I am very clearly of opinion that the claim of the Crown is untenable; and, having had the advantage of reading the judgments of my noble and learned friends Lord Macnaghten and Lord Davey, and, concurring as I do in the reasons given, I do not think it necessary further to develop the argument.

LORD LINDLEY. My Lords, the main question raised by this appeal turns on the true construction of s. 24, clause 3, of the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8). This enactment has no special reference to the London County Council, but is a general enactment applicable to that body, inasmuch as they have to pay interest to the holders of their consolidated stock.

The language of the enactment is such that, if it had to be construed by itself, I should feel some difficulty in putting upon it any other interpretation than that which has been put upon it by the Court of first instance and by the Court of Appeal, and which is contended for by the Crown. In other words, I should read "such tax" in s. 24, clause 3, as applying to income tax under Sched. D, and not as applying to income tax generally. But the enactment in question cannot be read by itself. Its object is simply to cure a defect in prior enactments, not to remodel them. Sect. 24, clause 3, must be read with them, and, so far as its language permits, it must be so construed as to accomplish its special object and produce with them

H. L. (E.) 1900 LONDON COUNTY COUNCIL v. ATTORNEY-GENERAL. Lord Lindley.

results which are in conformity with the principles on which they are framed, and with the scheme of taxation contained in their provisions. The construction to which I have alluded appears to me to be quite inconsistent with those principles and with such scheme. It introduces anomalies which are startling and irrational, and which there is no reason to suppose that the Legislature ever contemplated. The judgments of my noble and learned friends Lord Macnaghten and Lord Davey, which I have had the advantage of reading, have made this so clear that it is quite unnecessary for me to say more upon this point. The language of s. 24, clause 3, is by no means so plain and free from ambiguity as to justify a construction which leads to such results; and if authority is wanted to shew that the Income Tax Acts must be treated as a whole, such authority will be found in the decision of this House in *Colquhoun* v. *Brooks*. (1) The Courts below have not, in my opinion, given sufficient weight to those sections in the earlier Acts to which our attention was called by the appellants, and which have been so fully commented upon by the noble and learned Lords who have preceded me.

I also agree with what they have said on the subordinate question of apportionment.

For the reasons given by them, I have come to the conclusion that the judgments appealed from cannot be supported, and that the appeal should therefore be allowed.

Orders of the Court of Appeal and Queen's Bench Division reversed, and the information dismissed with costs here and below. Cause remitted to the Queen's Bench Division.

Lords' Journals, December 10, 1900.

Solicitors: *Blaxland; Solicitor of Inland Revenue.*

(1) (1889) 14 App. Cas. 493.

[HOUSE OF LORDS.]

MARY JANE HODDINOTT (PAUPER). APPELLANT;

AND

NEWTON, CHAMBERS & CO., LIMITED . . . . . } RESPONDENTS.

H. L. (E.)
1900
Dec. 10.

Employer and Workman—Compensation—Height of Building—Construction or Repair—Scaffolding—Workmen's Compensation Act, 1897 (*c.* 37), *s.* 7, *sub-s.* 1.

The Workmen's Compensation Act, 1897 (s. 7, sub-s. 1), applies only (inter alia) to employment on, in, or about any building which exceeds thirty feet in height "and is being constructed or repaired by means of a scaffolding."

These words do not confine the employment to the construction or repair of the building as a whole. "Construction" here includes a case where the building has been constructed and believed to be complete, but having been afterwards thought to be faulty and unstable is being strengthened by the addition of stays or supports.

"Scaffolding" may be external or internal and includes an internal staging arranged with planks and trestles and without poles.

The decision of the Court of Appeal reversed and the award of the county court judge restored ([1899] 1 Q. B. 1018) by Lords Macnaghten, Morris, Davey, and Brampton, Lords Shand and Lindley dissenting.

THE facts of this case are set forth in detail in the judgments of Lords Brampton and Lindley. They are summarised in the following statement, which is taken from the judgment of Lord Macnaghten.

The claim in this case as presented to the House is a claim under the Workmen's Compensation Act, 1897, for compensation in respect of an accident to a workman. It seems that about six months before the date of the accident the London General Omnibus Company took over a building which had been erected for them. They have used it as stables ever since. It may be assumed that the building was erected in accordance with the specifications prepared on behalf of the company, and that at the time when it was taken over nobody contemplated that anything further in the way of construction would be required. However, when the

BIBL. LONDIN UNIV.

H. L. (E.) 1900 HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED.

stables came to be used, it was found that there was some vibration, and the company determined to have the building stiffened. Accordingly, they engaged the respondents, who are ironwork contractors, to put in some heavy iron stays, weighing about one hundredweight apiece, between the girders and the pillars which supported the building. The appellant's husband was employed by the respondents on the work. In the course of his employment he met with an accident. He slipped and fell off a temporary staging while helping another workman to lift one of these iron stays. The stay fell upon him and he was crushed to death. The county court judge dismissed an action which was brought by his widow against the respondents claiming damages for negligence, and then proceeded to assess compensation under the provisions of the Act of 1897. The Court of Appeal (A. L. Smith, Collins, and Romer L.JJ.) set aside his order, being of opinion that the Act did not apply to the employment in which the deceased was engaged. (1)

The Workmen's Compensation Act is of limited application. Sect. 7, so far as material to the present question, is as follows:—

"7.—(1.) This Act shall apply only . . . . to employment by the undertakers as hereinafter defined on, in, or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding or being demolished.

"(2.) In this Act—. . . .

"'Undertakers' . . . . in the case of a building means the persons undertaking the construction, repair, or demolition."

"'Workman' includes every person who is engaged in an employment to which this Act applies . . . ."

Nov. 19. *Ruegg, Q.C.*, and *Moyses* (*Holland Biggs* with them), for the appellant. The evidence shews that the building exceeded thirty feet in height and was being constructed or repaired by means of a scaffolding within s. 7, sub-s. 1. The Court of Appeal, without deciding the question of the scaffold-

(1) [1899] 1 Q. B. 1018.

ing, held by a very narrow construction that the work in progress was neither construction nor repair. In one sense the building was completed; but it was found to need strengthening. The iron stays were added for stability, not ornament: without them the building was not safe. They formed part of the building and their addition was construction. The building resembled the Act itself; when brought into use it was found to be faulty, unsound and dangerous. There is no evidence that the architect of the building was rash, ignorant, or incapable, but without requiring to be pulled down and rebuilt it needed structural alteration. The Act seems to need re-making. For this work the respondents were the contractors; they were not sub-contractors. They are therefore liable: see *Mason* v. *A. R. Dean, Limited* (1), where it was held that where there are separate contracts for different parts of the work, each contractor is an "undertaker" within the meaning of the statute. The deceased was doing his work by means of a "scaffolding." There is no definition of the word in the Act, but the language of s. 7 seems to have been borrowed from the schedule to the Notice of Accidents Act, 1894 (c. 28), and the words are also found in the Factory Act, 1895, s. 23, sub-s. 2 (*a*). The decision in *Wood* v. *Walsh & Sons* (2), where a board, one end of which was tied to a rung of a ladder and the other rested on a sill, was held not to be a "scaffolding," even if it were correct, does not apply here, where the structure was more elaborate, the boards resting on ledgers and being supported in the middle by trestles. In *Ferguson* v. *Green* (3) the Court of Appeal held that whether the arrangement was a "scaffolding" or not was a question of fact in each case, from which no appeal lay: see Sched. II., clause 4. But the meaning of an Act of Parliament is a matter either of pure law, or of mixed law and fact. The result of this view is that the Court of Appeal in *Maude* v. *Brook* (4) have held that the structure was a scaffolding; and in a similar case, *Ferguson* v. *Green* (3), that it was not. An Act of such a construction tends to bring the law into disrepute.

(1) [1900] 1 Q. B. 770.
(2) [1899] 1 Q. B. 1009.
(3) [1901] 1 Q. B. 25.
(4) [1900] 1 Q. B. 575.

H. L. (E.) 1900

HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED.

Bray, Q.C., and *Spencer Bower*, for the respondents. The words of the Act must be taken in their collocation. The state of things contemplated by the Legislature is that of a building of an important character which requires for safety the erection of what builders would recognise as a "scaffolding." Thus Collins L.J. has laid this down as the standard of danger. Though the words "dangerous employment" are not in the Act, that was the point of view in fixing a minimum height of thirty feet. In any case this was not a scaffolding, but a mere temporary makeshift; what the Act meant was a firm structure. Further, the building was not thirty feet high—the parapet being only twenty-eight feet. What was done was not "construction," as the building was already complete. It was not "repair," for nothing was defective or worn out. The work might best be described as an improvement. It is an alteration, and in the section there is a careful avoidance of the words "alteration" or "addition." The words must be read strictly because among the definitions in s. 7, sub-s. 2, the word "alteration" is found twice but only in connection with "engineering work."

Ruegg, Q.C., in reply.

The House took time for consideration.

Dec. 10. LORD MACNAGHTEN (after stating the facts given above, and the parts of the Act relevant to the question). My Lords, the learned judges of the Court of Appeal agreed with the county court judge in holding that the building exceeded thirty feet in height. They were not agreed on the question whether the staging erected for the purpose of the work in hand was a "scaffolding" within the meaning of the Act. A. L. Smith L.J., without expressing any opinion of his own, thought there was evidence sufficient to justify the finding of the county court judge to that effect. Collins L.J. took a different view. Romer L.J. did not attempt to determine the point. All the learned judges, however, concurred in holding that the building in which the accident happened was not at the time being constructed or being repaired,

and that the respondents were not undertakers within the meaning of the Act. The ground of their decision is stated very clearly by A. L. Smith L.J.: "Were the iron-founders," he asks, "who put in these stays constructing the building? That cannot be," says his Lordship, "for it had already been constructed, and what was then done was only an addition to that which it had originally been contemplated would be wanted. How can it be said that the deceased was employed in a building which was being constructed? The construction was at an end, but some strengthening was afterwards needed to be done." Collins L.J., as it seems to me, went rather further, following out the views expressed by the other members of the Court to their logical conclusion. He thought that the only work contemplated by the Act in the case of a building besides demolition was construction or repair of the building "as a whole."

The argument addressed to your Lordships by the learned counsel for the respondents followed the same lines. The building, they said, when it was handed over, was complete according to the original design. Construction, therefore, necessarily was at an end. What was done afterwards, whether it was the result of caprice on the part of the company's engineer, as they suggested, or a bonâ fide attempt to make the building more suitable for the purpose for which it was intended, was only an alteration, or at the most an addition, and perhaps an improvement. It was not either construction or repair.

My Lords, I do not think it advances the argument to call the work an alteration, or an addition, or an improvement. I should suppose that any one of those terms might be applied to it properly enough. The question, as it seems to me, is this: Was the work—the thing that was actually being done—a work of construction or a work of repair, or something which was neither the one nor the other, neither construction nor repair? It seems a strong thing to say that when a building is once completed according to the original design you cannot have anything further in the way of construction unless the work be of such a character as to make the building practically

H. L. (E.) 1900 HODDINOTT v. NEWTON, CHAMBERS & Co., LIMITED. Lord Macnaghten.

a new building. That, however, was the argument. But the Act, it will be observed, uses the word "construction," not the word "erection." It speaks of a building "being constructed," not of a building "being erected." And it couples "construction" with "repair." Now repair, as the word is commonly understood, is repair whether much is done or little. Repair for the most part is occasional and partial. A man does not usually wait to repair his house until it is altogether ruinous and on the point of falling to pieces. Why may not construction be partial just as repair is partial?

Many cases were put in argument, and many others may be suggested. Is a man who adds a storey or a new room to a house constructing a building? Is a man constructing a building if he strips off a coating of stucco and faces his house with red brick or cut stone? In one sense he is; in another sense he is not. It depends upon what is meant by "constructing," and whether reference is made to the building as it was, or to the building as it will be when the proposed alteration is complete. My Lords, these and such-like questions may be very interesting puzzles, but I do not think they help one much. The question, after all, must be what is construction and what is repair in this Act of Parliament, where construction and repair are associated together. I do not think that "construction" can be limited to the original construction. That would be in effect substituting "erection" for "construction." Nor do I think that "construction" and "repair" can be limited to the construction and repair of a building "as a whole." Neither the word "original," which the learned counsel for the respondents so continually interpolated, nor the words "as a whole," which Collins L.J. would introduce, are to be found in the Act. They are glosses, and I think misleading. It seems to me that whenever new material is put into a building so that it becomes an integral part of the structure, you have something in the nature of construction; and that a building which is being so treated is being constructed within the meaning of the Act. You are putting together the old materials and the new. Now, if this be "construction," I do not think it can matter in the least whether the work is

taken in hand immediately after the erection of the building, or not commenced until months or even years later. Nor do I think it is of importance to inquire why the work has been undertaken. It cannot, as it seems to me, make any difference whether the person who gave the order for it was moved by a reasonable apprehension of danger or prompted by some idle fancy. What has to be looked to is the thing done, not the motive for doing it or the relative dates of the erection of the building and its subsequent alteration. Construction, repair, demolition—these three operations cover, I think, every varying phase in the life of a building from its beginning to its end.

I prefer to rest my judgment on this broad ground. But I cannot help thinking that something narrower would lead to the same result in the present case. May one not say with the strictest propriety that a building is in course of construction when it is being reconstructed in order to make it what it was intended to be—a firm and substantial structure, capable of resisting the action of the wind? Reconstruction is but construction over again.

The learned counsel for the respondents sought to draw an inference in their favour from the circumstance that the word "alteration" occurs in connection with engineering work, but not in connection with buildings. I should suppose that in the latter case it was omitted designedly, because it is impossible to conceive any alteration in a building—that is, of course, any substantial alteration—which does not involve construction. In the case of an engineering work as defined in the Act it is very different. To take one instance by way of example, "alteration" in the case of "a railroad" would include shifting or reversal of rails, alteration of points, change of levels, and many other things which no one would ordinarily call either construction or repair.

There was one point made by the learned counsel for the respondents which ought, I think, to be noticed. The learned counsel did not contend that the arrangement of boards and ledgers and trestles, which for want of a better word I have called a staging, was not a scaffolding in the common acceptation of the word. Everybody called it a scaffolding. But

H. L. (E.) 1900 HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED. Lord Macnaghten.

they argued that it was not such a scaffolding as was contemplated by the Act. Taking the view which commended itself to Collins L.J. both in the present case and in *Maude* v. *Brook* (1), they said that the scaffolding "must have some relation to the height of the building." And when pressed to submit a more definite proposition they proceeded to contend that it must be a scaffolding adequate for the construction or repair of a building exceeding thirty feet in height "as a whole," or, to use the language of the Lord Justice in *Maude* v. *Brook* (2), "One system of scaffolding for the whole building which is capable of being used for its construction or repair as a whole." That might have been a reasonable provision if the accidents to which the Act applies had been confined to accidents in some way connected with the use of the scaffolding. But it is not suggested that anything of the sort is to be found in the Act. All that the Act requires is that there should be a building exceeding thirty feet in height which is being constructed or repaired by means of a scaffolding. It says nothing about the height or position or extent of the scaffolding. It is not, I think, for the Court to lay down conditions which Parliament has not thought fit to impose.

I ought perhaps to add that I agree with my noble and learned friend, Lord Brampton, and with Collins L.J. in thinking that the question whether a temporary staging is a scaffolding within the meaning of the Act is not a mere question of fact on which the finding of the county court judge is final. It is a mixed question of fact and law. When the facts are ascertained it is a question of law on which the Court of Appeal is entitled, and I think bound, to express an opinion.

The provision as to the height of the building, and the provision with reference to a scaffolding, serve roughly to draw a line of demarcation between employments with which the Act is not concerned and those to which it is intended to apply. They were intended to exempt a certain class of buildings, and perhaps a certain class of builders of the humbler sort, from the operation of the Act. They are obviously copied from the Factory and Workshop Act, 1895, where the same provisions

(1) [1900] 1 Q. B. 575. (2) [1900] 1 Q. B. at p. 583.

serve a somewhat similar purpose. I do not think they throw any light on the construction of the Act.

I agree that the only way to construe the Act is to read it fairly, taking the words in their common and ordinary signification, and that the Court ought not to strain the language in order to bring in or to exclude any particular case, however arbitrary or unscientific the line of demarcation drawn by the Act may seem to be. But I think that in the present case the learned judges of the Court of Appeal have taken too narrow a view. If you construe the words of the Act so narrowly as to exclude one of the commonest operations of the builder, the alteration of buildings once completed, and so debar workmen engaged in that operation from all benefit of the Act, you are, I venture to think, violating the letter as well as the spirit of the enactment.

I think that the appeal ought to be allowed with costs in the Court of Appeal, and with such costs in this House as are allowed in pauper cases, and that the order of the county court judge ought to be restored. And I move your Lordships accordingly.

LORD MORRIS AND KILLANIN. My Lords, I agree in the judgment of my noble and learned friend in the chair, and in the reasons he has given.

That the building exceeded thirty feet in height and had some operations performed on it by means of scaffolding are questions of fact mainly, and were found in the affirmative by the county court judge, and not dissented from by the majority of the Court of Appeal. Nothing, in my opinion, remains but the question, Was the operation being performed on the building at the time of the accident either constructing or repairing the building? In my opinion, when you realize what the entity called the building is, all operations on it must be either constructing or repairing or demolishing—alteration in its construction is, in my opinion, constructing. I can find no reference in the statute to what is called a completed building in the judgment of A. L. Smith L.J.

In my opinion, whether completed or not completed, if work

H. L. (E.) 1900

HODDINOTT v. NEWTON, CHAMBERS & Co., LIMITED.

of the nature of construction goes on, that is constructing, and if work in the nature of repair, that is repairing, and there is no room for any third operation of so-called alteration, as distinct from constructing or repairing.

LORD SHAND. My Lords, the question for the decision of the House in this appeal is whether, when the deceased Benjamin Hoddinott lost his life, the respondents were engaged in the construction or repair of the building in which the accident occurred, or whether the work then being done was of the nature of an addition or alteration of a building, the construction of which had been completed about six months previously, the addition or alteration not being construction or repair as referred to in s. 7 of the Workmen's Compensation Act, 1897. That the question is one of difficulty sufficiently appears from the division of opinion in your Lordships' House. I have come to the conclusion that the judgment of the Court of Appeal is right and ought to be affirmed.

The statute in its 7th section draws a marked distinction between employment in engineering work and in the construction of a building, and in construing the statute the distinction is of importance to the decision of the case. In the opening part of that section the Act is declared to apply to "engineering work," and also to employment about any building which exceeds thirty feet in height, and is either "being constructed or repaired by means of a scaffolding or being demolished." In the same section engineering work is defined or described to mean "any work of construction or alteration or repair of a railroad, harbour, dock, canal, or sewer," or the other works there enumerated. Again, under the description of undertakers in the case of an engineering work, the term means "the persons undertaking the construction, alteration, or repair," and in the case of a building means the persons undertaking the construction, repair, or demolition.

Within the provisions of s. 7 of the statute, on the meaning of which the whole question in dispute turns, in three different passages engineering work is thus defined to include, not only construction or repair, but "addition," while in contrast with

this, in the case of a building, the definition twice repeated includes construction or repair only. The work by way of "addition" is not included. It must, in my opinion, especially having in view the juxtaposition of the provisions, be taken to have been designedly intended to create a distinction between the two classes of work.

It is more than doubtful whether the question really in dispute, as it has been argued in the Court of Appeal and again in this House, was clearly before the learned judge of the county court. The claim which was made under the Employers' Liability Act of 1880, which failed, suddenly became before him a claim under the Workmen's Compensation Act of 1897, under which he came to act as arbitrator. It is recorded by him in his notes that the Court holds: "The defendants were undertaking the construction, *alteration*, or repair." If the case was one of alteration only of an existing construction, it does not follow that the circumstances would create the liability insisted on, because that word is not in the statute applied to a building. The finding seems to shew that the learned arbitrator could not hold the case as one in which there was "construction," which inferred liability under the statute.

As to the question of repair, I lay it out of consideration, for, whatever was being done at the building, there was no repair going on. None of the completed work had gone wrong or given way so as to require any repair, or setting right in itself; and what was done was, therefore, no act of repairing, but something entirely new. The question remains, and it seems to me the only question in the case, Was the building in the course of construction?

There was little, if any, evidence given as to the facts bearing on that question, apparently because the appellant's case was really presented as one, under the Employers' Liability Act, of fault or negligence on the employer's part from alleged defective scaffolding. The evidence taken before the coroner seems to have been put in, and there the witness Nicholson said that the alteration to the building was to stay the building, "so that the wind may not vibrate it." Accordingly the facts beyond

H. L. (E.) 1900 HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED. Lord Shand.

this statement must be taken from the admissions made before the Court of Appeal. These admissions are really part of the appellants' case, for they are necessary to raise the question of liability as well as to give the grounds on which the Court of Appeal proceeded in holding that the statute did not apply; and Mr. Ruegg, in his able argument, candidly admitted the facts on which the Court of Appeal in their judgment proceeded. These facts are—(1.) that the building had been completed and in use for somewhere about six months before the accident occurred; (2.) that the work then being carried on was not contemplated when the building was constructed; (3.) that the iron stays were being put in to strengthen or stay the building and prevent vibration; and (4.) that the deceased who had not been employed in the construction of the building, was employed in putting in the stays.

In this state of the facts, I am of opinion, with the Court of Appeal, that the case is not within the provisions of the 7th section of the statute, as the building was not "being constructed by means of a scaffolding." It was a building which had been so constructed months before, and had been in use as a completed building, and on which an improvement, or an addition only, was being made. What is the distinction which the statute has drawn between engineering work and buildings? As I have said, the former includes construction, alteration, or repair; the latter, only construction and repair; and, repair being out of the case, "construction," which seems to me equivalent in meaning to "erection," only remains. If the word erection had been used, the appellant's argument would have been the same, that the placing of stays was erection in part, as it is now said to be construction of a part of the building. This was a constructed building, long in use, on which it was thought desirable to make an improvement, or addition, to make it more secure or more comfortable. Is it to be said that every such improvement or addition, where scaffolding is in use in the building, is "construction" of a building within the meaning of the statute? I cannot give to the term "construction" so wide, I might say so loose, a signification. The work might be the putting in of one or more windows in order to

light the building better, or it might be the making of commodious presses, internal presses or closets, or the making of closet or lavatory arrangements by internal work. It appears to me that such additions, alterations, or improvements in a building cannot be regarded as "construction," and I say the same in regard to stays put in in order to prevent vibration.

The erection of a new or additional storey to a building might be represented as construction, because in that case a new building, including an outside structural wall, is really made or constructed; but that entirely differs from such internal operations as occurred in the present case, and the character of the addition, improvement, or alteration, in my opinion, makes all the difference.

The argument of the appellant disregards the distinction which the statute has drawn between engineering work and work on a building. It has been observed that the word "alteration" may have been omitted designedly, because it is impossible to conceive any alteration in a building which does not involve construction. The observation would, it appears to me, apply with the same force to a "railroad, harbour, dock, canal, or sewer" in which engineering work may be employed. The use of the term construction was not deemed sufficient to include in that case work of the nature of an addition, and accordingly that term was added, and I am unable to construe the term construction in a wider sense when it is used as applied to a building, so as to include everything of the nature of an improvement or addition, than the proper sense in which it is used as applicable to engineering works in the same sentence.

It was argued for the appellant that if a case of repair, and it might be of comparatively small repair, is sufficient to bring the building within the statute, why should not an improvement or addition also have the same effect? The answer to that observation is that the statute in its terms has drawn and enacted a distinction between the two cases. For my part I agree in thinking the distinction ought to be done away with, and cases of alteration should be put on the same footing as those of repair; but this must be done by amending legislation,

H. L. (E.) 1900 HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED. Lord Shand.

and not by straining the language used so as to include cases which it may seem desirable to include, though the terms used will not, according to their ordinary and proper interpretation, do so.

I agree in thinking that the staging from which the deceased fell was a scaffold or scaffolding within the ordinary meaning of these words, and that it was so seems to be simply a question of fact. I further agree with my noble and learned friend Lord Macnaghten that, as a matter of law, the erection and use of a scaffold or scaffolding "capable of being used for the construction or repair of the building as a whole" is not required in order to bring the building under the provisions of the 7th section of the statute.

LORD DAVEY. My Lords, I agree with my noble and learned friend on the Woolsack, and I only desire to add two observations of my own.

This case is of course not free from difficulty, but I have come to a clear opinion that the addition of these iron stays was "construction" within the meaning of the Act. The Master of the Rolls says it was not construction, because the building was already completed. I take leave to say that the learned judge assumes the whole point in controversy. No doubt it was intended to be completed, and the parties thought it was completed when the omnibus company took possession. But the experience of a few months shewed that something more was needed to adapt it to the purpose for which it was intended, or, in other words, that it was not in fact complete; and the addition of these iron stays was required to complete the construction. It is none the less construction because it was an addition made at a later date or, because the addition was not contemplated or was omitted in the original specification, and the necessity for it was not then apparent.

The second observation is as to the construction put by Collins L.J. on the words of the Act. The learned Lord Justice says that the scaffolding must bear some relation to the height of the building, and be such a scaffolding as would be required to construct or repair a building of that height. I

think it very likely that the draftsman had something of that kind in his mind, but I can only interpret the Act by the language which he has used. The Lord Justice further says that the requirement of a building of a certain height and of a scaffolding was intended to fix the standard of danger to the workmen. That would be all very well if the compensation was confined to accidents arising out of or in some way connected with the height of the building or the scaffolding. But that is not so. By the 7th section the Act is made applicable to any employment "in or about any building," &c., without any qualification. A carpenter, for example, employed on the ground-floor in preparing and putting in the woodwork, the joists, doors, and window-frames, would be within the Act though he never went near the scaffold.

My Lords, I will not detain you further. I have had the opportunity of seeing the judgment about to be delivered by my noble and learned friend Lord Brampton. He has gone very fully into the question whether the platform in question was scaffolding within the meaning of the Act. I will not anticipate what he will read, but only say that I entirely agree with his reasoning. I express my concurrence in the motion proposed by my noble and learned friend on the Woolsack.

LORD BRAMPTON. My Lords, Benjamin Hoddinott, the late husband of the appellant, a riveter, being a workman in the employ of the respondents, ironwork contractors, was, on August 19, 1898, fatally injured whilst working for them at and in a building at Putney exceeding thirty feet in height, and occupied as stables by the General Omnibus Company. He died on the 22nd of the month, leaving the appellant surviving him, and it is not disputed that if any compensation is payable under the Workmen's Compensation Act, 1897, in respect of his death, she is the person to claim it.

The facts of the case are very loosely stated in the appendix, but are sufficiently supplemented in the judgment of A. L. Smith L.J. (1) to enable me to form my opinion upon them. The building, a new one, especially designed for stables, was erected

(1) [1900] 1 Q. B. 1018.

H. L. (E.) 1900 HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED. Lord Brampton.

for the General Omnibus Company, according to a contract and specification, by a firm of builders, unconnected with the respondents, by means of ordinary builders' external scaffolding. It was roofed in and completed by the builders, so far as they were concerned, about six months before the time of the accident. On the completion of the building the scaffolding was removed, and from that time the stables have been occupied by the horses of the omnibus company. A few months after such completion, and very shortly before the accident, it was considered by the engineer of the company that the building was deficient in stability and required to be stiffened in order to strengthen it and prevent its vibration by the wind, with possible danger to the whole structure. To remedy this it was determined to introduce iron stays (each weighing about one hundredweight), and by means of them to connect the iron girders over the stalls with the upright iron columns inside the building. The respondents were employed by the omnibus company, and they undertook to do this work, and the appellant's deceased husband was employed by them upon it. At the time of the accident he was with a fellow-workman inside the stable, standing upon a platform erected solely for the purposes of this work. It was used by the workmen in the daytime, but was removed every evening to enable the horses to occupy their stalls for the night. No poles were used in its construction; it was formed by boards each twelve feet long, nine inches wide, and one and a half inches thick, resting on ledgers lashed to the iron columns, and, in order to make the structure more firm, trestles were placed under the middle of the scaffold boards to support them. The platform on which the deceased was standing was raised about eight feet above the ground. He was in the act of lifting one of the stays when he lost his balance and fell to the ground, the stay falling on him, and he died from the injuries thereby occasioned.

No question arises as to the regularity of the proceedings before the county court judge, who found as facts, first, that the building was of a height exceeding thirty feet, measured from the ridge of the roof, though the top of the parapet wall was only twenty-eight feet; secondly, that the work the

deceased was employed upon was a work of "construction, alteration, or repair," and he held that the structure from which the deceased fell was "scaffolding" within the meaning of s. 7 of the Act, and awarded to the appellant, as widow of the deceased, 245*l.* 14*s.* as compensation.

I would here point out that there really was no finding to justify any award, for the county court judge only found that the deceased was engaged on one of three descriptions of work—construction, alteration, *or* repair. If it was "alteration," no claim would arise. The point, however, was not taken, and this House, I assume, will treat the finding as though the word "alteration" had been omitted.

The 7th section of the Act, sub-s. 1, enacts: "This Act shall apply only to employment by the undertakers on, in, or about any building which *exceeds* thirty feet in height, and *is* either being constructed or repaired by means of a scaffolding, or being demolished."

In endeavouring to arrive at a satisfactory interpretation of this section, one labours under considerable difficulty. The whole statute is full of incongruities. In it, so many things are said which could not have been meant, and so many things which must have been meant are left unsaid, that one often has great hesitation in even forming a conjecture as to what may have been the views and intentions of its framers.

What, for instance, could be the object of debarring a workman from seeking compensation under the Act for any injury he might sustain during his employment in erecting a building intended to be of much greater height than that mentioned by means of a scaffold, until that building has been already actually erected to a height exceeding thirty feet, even though such injury is caused by something falling on him from the very scaffold which had been put up to a much greater height for the purposes of the building then in course of construction? Yet this was in substance ruled in the case of *Billings* v. *Holloway* (1) by compulsion of the plain unambiguous language of the Act. The effect of this enactment would, in the case of a building intended to be thirty-one feet high, be to limit the

(1) [1899] 1 Q. B. 71.

H. L. (E.) 1900

HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED.

Lord Brampton.

liability of the employers to the period of time occupied in erecting the last foot.

I have neither heard nor read any satisfactory reason for the enactment. I am rather inclined to think it was taken and adopted without consideration from art. 2 of the schedule to the Notice of Accidents Act, 1894 (57 & 58 Vict. c. 28), defining the character of the accidents required to be notified to the Board of Trade—an article which is foreign to the objects of the Act I am now considering, and which article was repealed by 58 & 59 Vict. c. 37, s. 54, before the passing of the Workmen's Compensation Act. It is not disputed by any one that the Act applies to internal as well as to external scaffolding.

I pass on to consider now the only questions which this House is called upon to decide in the present case.

They are, first, whether the work upon which the deceased was employed when he met with his injury was a work either of construction or repair; secondly, whether the structure from which he fell was "a scaffolding" within the meaning of the 7th section, sub-s. 1.

In his judgment in the Court of Appeal, A. L. Smith L.J. said (1) that it could not be construction, for that the building had already been constructed and completed, and was in actual use, and that which was done was only an addition to that which had originally been contemplated; and that an addition could not come under the head of repairs; and on that ground the appeal from the county court judge was allowed.

I cannot assent to this view of the case, my own opinion being that that which was being done to the building was a work of *construction*. It must be conceded that, so far as the original builder was concerned, his contract had been carried out according to the specification, and the external scaffolding had been removed six months before the accident, and it was then considered by all concerned that the building needed nothing more to make it fit for permanent use. This concession, however, seems to me to be immaterial. We have nothing to do with the building contract. The question we have to

(1) [1899] 1 Q. B. 1022.

deal with is, was the building in fact fully constructed, or was it faulty and deficient in its construction, for the purpose for which it was intended? If that which was being done when the accident occurred was needed for the proper strength of the building, and ought to have been done, but was omitted to be so when the builder had finished his work, then, whether such omission was attributable to the neglect or oversight of those who framed the specification, or to the builder failing to perform his obligations, the building was in fact deficiently constructed, and if the work done was simply to supply that deficiency and make the building what it ought to have been at the first, it was a work of construction. It may be that it was also an addition in the sense that it was an addition of something necessary to supply an omission, and give to this building that inherent strength which it ought to have had originally.

If the same stays which were in course of being fitted when the accident happened had been so fitted before the original building had been handed over by the builders to the company, they would clearly have formed a part of the building: why should they not become so when fitted to supply the omission of that which was deemed to be essential to its security? I fail to see any reason, and I therefore think the work was one of construction. Suppose the foundation of one of the walls had been found to be insecure, would not work done to make it safe be work of construction? Assuming I am right in the view I have expressed, what signifies it that the discovery of the defect was not made for a long time? That would not alter the fact.

Assuming, however, for a moment that when the builders' work was originally completed, it was in all respects apparently perfect, but that in the course of a few months it was from some undiscovered cause found to be deteriorated, and so unsteady that it was necessary to put in the stays or to do some other work to restore it to the condition it had been in when the builders left it: why that might not be treated as repair, I fail to see. No cases have yet been decided upon the subject of what is "construction" and what is "repair." In

H. L. (E.) 1900 HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED. Lord Brampton.

Wood v. *Walsh* (1) A. L. Smith L.J. said, "Constructed or repaired means some work relating to the structure of the building."

I will now deal with the question whether the arrangement on which the deceased was working, and from which he fell, was a scaffolding within the meaning of s. 7, sub-s. 1, of the statute.

Hitherto the Court of Appeal seems to have treated this question as a matter of fact for the county court judge or the arbitrator, by whom the claim for compensation is heard, to determine, and upon which his finding is not open to review. In the last reported case on this subject, *Ferguson* v. *Green* (2), it was so expressly ruled by the Master of the Rolls (Sir A. L. Smith) and Collins and Stirling L.JJ., following previous decisions by the same Court, *Wood* v. *Walsh* (1) and *Maude* v. *Brook*. (3) With all respect for those judgments, I cannot concur in them.

I thoroughly agree that the arbitrator or county court judge is the proper tribunal to find every fact which is necessary for the determination of the question whether the arrangement in the particular case before it is or is not "scaffolding" within the meaning of the Act. Such, for instance, as the mode in which the arrangement is put together, the component parts of it, the materials used for its construction, the use to which it is applied, the place and the size of the place in which it is used, the dimensions of it, &c.; and his finding upon such facts is, according to the general rule, final; but whether upon the facts so found, the arrangement so constructed is a scaffolding sufficient to satisfy the requirements of s. 7 is, in my opinion, a question of law, which in the first instance must be adjudged by him to enable him to determine the case before him, his judgment on the question of law being open to review by the Court of Appeal. I think it is expedient that it should be so, for were it otherwise, considering the number of county court judges and arbitrators who are called upon to try such cases, there would probably be much diversity in their judgments

(1) [1899] 1 Q. B. 1009. (2) [1901] 1 Q. B. 25.
(3) [1900] 1 Q. B. 575.

upon the question, and the law would be very unsettled. Whereas by holding that the Court of Appeal has jurisdiction to review such finding, something like uniformity in the decisions as to what constitutes a scaffolding will very soon be established. This view is confirmed by the opinion of Collins L.J. in the case of *Maude* v. *Brook* (1), in which he expressly said: "Whether a particular arrangement is a scaffolding is not a question of pure fact, and therefore not merely a question for a jury without direction as to the law." Whether a bicycle was a carriage within the meaning of the Highway Act was treated as a question of law in *Taylor* v. *Goodwin*. (2)

No definition is given in the Act as to what shall be deemed a scaffolding within the meaning of the 7th section. Nor do I think it would be possible to frame a satisfactory definition which would be universally applicable. Few people are unacquainted with that character of scaffold which has for certainly many generations been commonly used by builders, but nobody in these days would venture to assert that the meaning of the word "scaffolding" is confined to such arrangements as those; and I entirely agree with Rigby L.J., who, in his judgment in *Maude* v. *Brook* (3), says: "In construing the Act we are not at liberty to confine the meaning of the word 'scaffolding' to that which is its most usual form; anything whether usual or unusual that can properly be called scaffolding is within the Act"; and a little later on he illustrates his meaning by expressing a clear opinion that, if a builder had the control of two walls, one on each side of the site where a scaffold was needed, he might, if he could do so, utilise them by laying planks across from one to the other, and that such a structure would be a scaffolding without the use of either poles or trestles; so in like manner in the present case, in my opinion, the iron columns already existing in the stables might equally be used—as they were—to form a scaffolding by lashing to them by ropes pieces of wood or metal to help in the support of the boards which were to form the platform on which the workmen were to do their work. No doubt for all external scaffolding wooden

(1) [1900] 1 Q. B. 581. (2) 4 Q. B. D. 228.
(3) [1900] 1 Q. B. 579.

H. L. (E.) 1900

HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED.

Lord Brampton.

poles, boards, and planks, fastened together by ropes in the ordinary way, are commonly used, because they are found to be most convenient; but they are not essential to the formation of external scaffolding, while for internal scaffolding it would for the most part be impossible to use such scaffolding in houses or buildings divided into rooms.

Possibly some day a question may arise whether an arrangement suspended from the ceiling, such as is often used for the interior of cathedrals, &c., is a scaffold within the Act. Old dictionary definitions, written more than a century ago, on such a subject are but of little use in these modern days, except to inform us as to the general character and use of a scaffold or scaffolding. For that purpose only I refer to an old dictionary published in 1754, composed by Dyche and Pardon, in which a scaffold is described as "a place erected above the ground with poles for walls and supports, and boards laid loosely for floors, to serve a present occasion of workmen's standing safe and easily to repair or build a house, church, &c., or for spectators to see a show, &c.," and "scaffolding" is defined as "the poles, boards, &c., that are kept or made use of to build or erect scaffolds upon any occasion."

In Walker's Dictionary, "scaffolding" is defined as "a support for workmen." Now, when s. 7 speaks of "a building which is either being *constructed* or *repaired* by means of scaffolding," it obviously includes either external or internal work of construction or repair, and it contemplates a scaffolding being used for either, and it is noticeable that it speaks of workmen employed "on, *in*, or about" a building. The line between that which constitutes construction and that which constitutes repair is often a very fine one, and either may be needed *either* inside or outside a building. Brickwork may become defective, window or door sills may require to be taken down and replaced by new ones, beams supporting ceilings may give way, plastering may fall away from walls, &c., in any part of a building—for most of such works, whether of construction or repair, a scaffold of some kind is necessary. Outside the house, if the work to be done was high up, it might be most convenient to use a tall substantial one; inside, in rooms,

a much smaller one would be all that was required, and that might be constructed in a variety of ways, and of any material or combination of materials suitable for the purposes. The size, height, and mechanism of it would, as a matter of fact, of course, depend upon the position in the building of the place needing construction, reconstruction, or repair, and a variety of circumstances impossible to anticipate, and which, therefore, I will not attempt to describe. A reference to decided cases will give some idea of what might and what could not satisfy the term "scaffolding." I will merely mention the most recent of them: *Wood* v. *Walsh* (1); *Maude* v. *Brook* (2); *Hoddinott* v. *Newton, Chambers & Co.* (3)

In my opinion the structure in the case now before us may well be described as a scaffold within the meaning of s. 7. I know that Collins L.J. expressed a different opinion both in *Hoddinott* v. *Newton, Chambers & Co.* (3) and in *Maude* v. *Brook*. (2) In the latter case that learned judge summarises his opinion thus (4): "The word 'scaffolding' as used in this Act indicates that there must be one system of scaffolding for the whole building which is capable of being used for its construction or repair as a whole." I cannot agree in this, for, were it so, it would be impossible to introduce into an ordinary room undergoing repair and requiring the use of a scaffold, one adapted for the construction or repair of the whole building. I think the meaning of the Legislature was that from time to time, when work of construction or repair required the aid of a scaffold, any scaffold suitable for that particular purpose would be within the meaning of s. 7. The scaffold used in the construction of the building as a whole had no connection with the accident in this case; it had ceased to exist months before the work on which the deceased was employed was even contemplated, and even had it been in existence, it would have been useless as regarded that work. Had there been no scaffold used in the construction of the original building I should have thought it immaterial to the present case, though it might have protected the employer

(1) [1899] 1 Q. B. 1009.
(2) [1900] 1 Q. B. 575.
(3) [1899] 1 Q. B. 1018.
(4) [1900] 1 Q. B. at p. 583.

H. L. (E.) 1900 HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED. Lord Brampton.

against compensation for accidents happening during the construction of the original building. This scaffolding pointed to in s. 7 must and could only reasonably apply to one used for the particular work in the course of being carried out when the accident occurred. In construing this section it must be remembered that the Act was only passed in 1897 (about three years ago), when an indefinite number of buildings exceeding thirty feet in height were in existence—some unsafe and requiring demolition, others badly constructed at first and requiring work of reconstruction; others from one cause or another falling into a state of deterioration and needing repairs to make them fit for future occupation. All these conditions must have been in the contemplation of the Legislature in framing the Act. When I realize to myself that the necessity for such works of construction or repair may occur in all or any parts or part of the building, whether high up near the top or low down even to the foundations, and that such defects will in course of time inevitably make their appearance in the now newest buildings, and that such works, reconstruction, or repair will, when the defects cannot be reached by a man standing on the ground, require the assistance of a scaffold, I feel driven to the conclusion that the Act, with all its faults, in using the word "scaffolding" meant scaffolding suitable for the occasion, and could not have intended to confine it to such a scaffold as was capable of being used for the construction or repair of the building as a whole, which in a large majority of cases would be so inconvenient and costly as to be absurd.

For the reasons I have given, I think that this appeal should be allowed with the usual costs.

LORD LINDLEY. My Lords, this is an appeal from a decision of the Court of Appeal against an award made under the provisions of the Workmen's Compensation Act, 1897.

The facts of the case are not in all respects so clear as might be desired; but admissions were made by counsel on both sides, both before the Court of Appeal and at your Lordships' bar, and with the assistance of those admissions the facts may be stated as follows.

Some time before the accident which gave rise to the claim for compensation, the London General Omnibus Company had employed some builders to erect some large stables for them in Putney. Those stables had been erected and completed, according to the original design and specification, some five or six months before the time of the accident, and had been taken over and used by the omnibus company for stabling their horses.

The stables were constructed partly of brickwork and partly of iron. The ironwork consisted of upright pillars carrying transverse girders. There were two storeys, and the horses were stabled both on the ground floor and on the first floor. The height of this erection was twenty-eight feet from the ground to the top of the walls, and thirty-six feet to the ridge of the roof. None of the scaffolding used in the erection of the stables was standing when the accident happened. The defendants, Newton, Chambers & Co., had not been employed in the erection of these stables.

After they had thus been completed and had been in use for stables, it was thought desirable to put in some iron stays in order to prevent vibration, and the defendants, Newton, Chambers & Co., were employed by the omnibus company to do this work. The stays were T angle iron bars twelve or fourteen feet long and about one hundredweight in weight. These were to be fastened by one end to the upright pillars on the ground floor, and to the transverse girders carrying the first floor. The stays were put diagonally across the angles made by the pillars and girders, and they met, or nearly met, at the top. They thus stiffened the ironwork and stopped the vibration. The extent of the vibration is not proved; the cause of it is not proved; why it was desirable to stop it was not proved. There is no evidence whatever to shew that the building was unsafe. It was stated before the coroner that the stays were put in "to stay the building so that the wind might not vibrate it." The evidence before the coroner was used by consent before the judge of the county court, and also before the Court of Appeal. But this is all that can now be ascertained as to the reason for putting in the stays. The inquiry

H. L. (E.) 1900

HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED.

Lord Lindley.

is only important with reference to the question whether the building was being constructed when the accident happened. To this question I will return presently.

The stays were put up in the daytime, when there were few, if any, horses in the stables. The stays had to be lifted up into their proper places and held there for a short time whilst the places at which rivet-holes were to be made were marked. To enable the workmen to raise the stays to their places and to hold them there, platforms had to be constructed about eight feet above the ground floor; and in order to stable the horses at night these platforms had to be daily constructed when the stables were empty, and to be removed before the horses came in for the night. These platforms were made by placing ordinary loose planks carried by trestles and by ledgers laid across poles lashed to the pillars. These platforms are called scaffolds by all the witnesses who speak of them, and by the county court judge and by the members of the Court of Appeal. I so regard them; I do not know how better to describe them. I will consider presently whether they come within the meaning of a scaffolding as used in the Workmen's Compensation Act.

The husband of the plaintiff was on one end of these scaffolds lifting one end of a stay, whilst another man was lifting the other end. The plaintiff's husband overbalanced himself, or was overbalanced, and he fell from the scaffold and died shortly afterwards.

The plaintiff brought an action for damages against the defendants on the ground of negligence and defect in the scaffold; but the county court judge decided that the scaffold was not insufficient, and that the accident was not caused by insufficient scaffolding. Thereupon an application was made for compensation under s. 1, clause 4, of the Workmen's Compensation Act, 1897, and the county court judge heard such application, and decided that the defendants were "undertaking the construction, alteration, or repair of the stables." He further decided that the building exceeded thirty feet in height, and he awarded the plaintiff compensation to the amount of 245*l.* 14*s.*, from which, however, part of the defendants' costs of the action were to be deducted. From this award the defendants

appealed, and the Court of Appeal set aside the decision of the county court judge. From this decision the plaintiff has obtained leave to appeal in formâ pauperis to this House, and the appeal has been fully argued at your Lordships' bar.

The case turns on ss. 1, 7, clauses 1, 2, of the Workmen's Compensation Act, 1897, and on the language there used with reference to buildings. The putting in of the stays was not an engineering work as defined in s. 7. This observation is important, because in the case of an engineering work undertakers are defined to mean "the person undertaking the construction, alteration, or repair"; whilst in the case of a building, undertakers are defined to mean "the persons undertaking the construction, repair, or demolition," the word alteration being omitted.

Confining ourselves to buildings, and interpolating the definition of undertakers of buildings, s. 7, clause 1, makes the Act applicable, but only applicable, to employment by persons undertaking the construction, repair, or demolition of any building of any person on, in, or about any building which exceeds thirty feet in height, and is being constructed or repaired by means of a scaffolding, or being demolished. Now, I cannot bring myself to say that the defendants were persons undertaking the construction, repair, or demolition of these stables. Demolition may be disregarded: nothing was being demolished. Repair may also be disregarded: nothing was out of repair. Construction alone remains; but can it be fairly said that the defendants, who had nothing whatever to do with the erection of the stables, undertook the "construction" of them when they undertook to stop or diminish the vibration of which their owners complained? It is true that the stays were additions to portions of the structure of the stables, and in that way were additions to the stables. But constructing a building is one thing; improving it after it is constructed, even by making additions to its structure, is quite a different thing. I quite admit it may be very difficult to draw the line sharply in all cases between constructing a building and adding to its structure; but in this particular case I see no difficulty at all in coming to the conclusion that the defendants did not

H. L. (E.) 1900 HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED. Lord Lindley.

undertake to construct this building, and were not undertakers within the meaning of the Act. I cannot bring them within the words of the definition. The fact that the word "alteration," which enters into the definition of undertakers of engineering works, is omitted from the definition of undertakers of buildings, is not to be overlooked, and it supports the conclusion at which I have arrived. If the omission were designed, it would support such conclusion very strongly. But the act is very badly drawn, and it is scarcely safe to rely on the contrast between the two definitions. It is safer to rely on the fact that in the definition of undertakers of buildings nothing is said about additions, improvements, or alterations; and unless they can fairly be regarded as works of construction, repair, or demolition, the persons who undertake them are not undertakers as defined in s. 7.

The learned county court judge evidently failed to appreciate the difficulty created by the definition clause; for he introduced the word "alteration," and found that the defendants were undertaking the "construction, alteration, or repair." This finding was clearly insufficient to make them liable under the Act.

I pass now from the builders to the building itself. The Act does not apply to all buildings, but only to those which exceed thirty feet in height and are being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power is being used for the purpose of the construction, repair, or demolition thereof. These words relating to the use of machinery have no application to the present case, and I therefore say nothing about them. The provisions relating to height and to the use of scaffolding refer to the time of the accident, and not to any time before or afterwards. The use of the present tense "which exceeds thirty feet," and "is either being constructed or repaired," &c., shews this; and the Court of Appeal so decided in *Billings* v. *Holloway*. (1) Why thirty feet should have been adopted as the minimum height is not apparent, but that limit is adopted, and the only question is

(1) [1899] 1 Q. B. 70.

how the measurement is to be made. The county court judge and the Court of Appeal have both held that the height of the roof must be reckoned, and be added to the height of the walls, and this appears to me obviously correct.

The reference to scaffolding creates great difficulty. Sects. 1 and 7 of the Act clearly extend to accidents which are not caused by defective scaffolding, and which are not in any way attributable to the use of scaffolding. If a house is thirty feet high, and is being constructed or repaired by means of a scaffolding, and any workman is injured to the extent mentioned in s. 1, clause 2 (*a*), by any accident arising out of and in the course of his employment on, in, or about such building, he is entitled to compensation, whatever the cause of such accident may have been, unless it arose from his own serious and wilful misconduct (see s. 1, clause 2 (*c*)). This seems plain from the language of ss. 1 and 7, and has also been decided by the Court of Appeal in *Maude* v *Brook*. (1) But the use of a scaffolding is essential to bring a building being constructed or repaired within the Act where no machinery is employed to construct or repair it. What is meant by a scaffolding? Is any scaffolding meant? Is there any difference material to the present question between a scaffolding and a scaffold? My Lords, there is nothing in the Act which requires the scaffolding to be of any particular description or dimensions, or to be in any particular place or of any particular height. I cannot help thinking that to make any distinction between one scaffolding and another, or between a scaffolding and a scaffold, would be to introduce a subtlety not required by the Act, and one far too fine for practical work. In my opinion, anything which can fairly be called a scaffold is a scaffolding within the meaning of s. 7 if used as mentioned in the Act. This I understand to be the view adopted by the present Master of the Rolls and by Rigby L.J. (2) But a more restricted meaning is put on the word scaffolding by Collins L.J. (3) He thinks that boards on trestles inside a room are not, in point of law, a scaffolding

(1) [1900] 1 Q. B. 575.
(2) See [1899] 1 Q. B. 1021, and *Maude* v. *Brook*, [1900] 1 Q. B. 575.
(3) See [1899] 1 Q. B. 1023, 1024, and [1900] 1 Q. B. 580, 581.

H. L. (E.) 1900

HODDINOTT v. NEWTON, CHAMBERS & CO., LIMITED.

Lord Lindley.

within the meaning of the Act, and he did not consider the platforms in this case to be such a scaffolding. He thinks that nothing can be a scaffolding within the Act except "one system of scaffolding for the whole building, which is capable of being used for its construction or repair as a whole." (1) My Lords, I cannot go so far. I cannot say that boards on trestles, even inside a room, may not be a scaffolding, and still less can I say that the platforms in question in this case could not be so regarded if used as mentioned in the Act. This question of scaffolding is one of such importance, and it was so much discussed at your Lordships' bar, that I have thought it desirable to allude to it, and to express my own opinion upon it.

But although I think the platform in this case might have been a scaffolding within the meaning of s. 7, and that the stables were a building more than thirty feet high, yet, for reasons already stated, I cannot come to the conclusion that the building was being constructed or repaired when the accident happened.

The Act, therefore, has no application to this case: it does not apply either to the defendants or to the building at the time of the accident.

The appeal ought, in my judgment, to be dismissed.

Order of the Court of Appeal reversed and award of the county court judge restored: the respondents to pay the appellant her costs in the Courts below and in this House, costs in this House to be taxed in the manner usual when the appellant sues in formâ pauperis. Cause remitted to the county court.

Lords' Journals, December 10, 1900.

Solicitors: *C. F. Appleton; Ingle, Holmes & Sons.*

(1) See [1900] 1 Q. B. 583.

Principle applied. JOBBINS *v.* MIDDLESEX COUNTY COUNCIL. [1948] 2 All E.R. 610.

[HOUSE OF LORDS.]

H. L. (E.) 1900 Dec. 14.

LYSONS . . . . . APPELLANT;

AND

ANDREW KNOWLES & SONS, LIMITED RESPONDENTS.

STUART (WIDOW), ADMINISTRATRIX OF WILLIAM JOHN STUART, DECEASED . . APPELLANT;

AND

NIXON & BRUCE . . . . . RESPONDENTS.

Employer and Workman—Employment for less than Two Weeks—"Average Weekly Earnings"—Factory, Occupier of—Loading and Unloading from Wharf, &c.—Factory and Workshop Act, 1895, *c.* 37, *s.* 23, *sub-s.* 1 (*ii.*) (*a*) —*Workmen's Compensation Act*, 1897, *c.* 37, *s.* 1 *sub-s.* 1, *s.* 7 *sub-s.* 2; *First Sched.* (1) (*a*) (*i.*) (*b*).

The right to compensation given by s. 1 of the Workmen's Compensation Act, 1897, is not restricted by the schedule to employments by the week, or for weekly wages, or for two weeks at least. Employment by the day for one or more days is within the Act.

The word "average" in the expression "average weekly earnings" is used loosely and inaccurately in the 1st schedule to the Act.

The decisions of the Court of Appeal, [1900] 1 Q. B. 780, and [1900 2 Q. B. 95, reversed.

Stevedores were loading a vessel in a dock by means of machinery. The cargo had been put into the hold, and the men employed by the stevedores were "finishing off" by slinging iron beams across the hatchway. The machinery having become entangled, one of the workmen went to disentangle it, was caught by it, and injured so that he died:—

Held, by the Earl of Halsbury L.C. and Lords Macnaghten, Shand, Davey, Brampton, and Robertson (Lord Lindley dissenting), that the stevedores were occupying a "factory," namely, the machinery, within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2, and the Factory and Workshop Act, 1895, s. 23, sub-s. 1 (ii.), and that the deceased was injured in the course of his employment in loading from the wharf, the process of loading not being complete till the hatchway was secured, within the meaning of those Acts.

IN the first appeal, *Lysons* v. *Andrew Knowles & Sons, Limited*, Lysons entered the employment of the respondents as a collier on Tuesday, July 18, 1899, and earned 6*s*. The next

H. L. (E.) 1900

LYSONS v. ANDREW KNOWLES & SONS, LIMITED.

STUART v. NIXON & BRUCE.

day he did not work. On Thursday, the 20th, he worked again, and was injured by an accident arising out of and in the course of his employment. In that colliery the miners' week begins on Wednesday, and ends on Tuesday night. Lysons was paid as a piece worker 6*s.* for the Tuesday and 6*s.* for the Thursday. In an arbitration under the Workmen's Compensation Act, 1897, the county court judge of Lancashire (Salford) found as a fact that Lysons worked during one week and earned 12*s.*, and that he was therefore entitled under the 1st schedule, s. 1 (*b*), to 50 per cent. of his average weekly earnings, i.e., to 50 per cent. of 12*s.*, or 6*s.* for every week of disablement after the first fortnight, and he awarded him 24*s.* The Court of Appeal (A. L. Smith, Collins, and Romer L.JJ.) set aside this decision, holding that Lysons was entitled to nothing, not having been in employment for two weeks. (1)

Lysons appealed.

By the Workmen's Compensation Act, 1897, c. 37, s. 1, sub-s. 1, "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act."

By the "First Schedule (Scale and Conditions of Compensation. Scale).

"(1.) The amount of compensation under this Act shall be—

"(*a*) Where death results from the injury—(i.) if the workman leaves any dependants wholly dependent upon his earnings at the time of his death, a sum equal to his earnings in the employment of the same employer during the three years next preceding the injury, or the sum of 150*l.*, whichever of those sums is the larger, but not exceeding in any case 300*l.*, provided that . . . . if the period of the workman's employment by the said employer has been less than the said three years, then the amount of his earnings during the said three years shall be deemed to be 156 times his average weekly earnings during the period of his actual employment under the said employer; . . . .

(1) [1900] 1 Q. B. 780.

"(*b*) Where total or partial incapacity for work results from the injury, a weekly payment during the incapacity after the second week not exceeding fifty per cent. of his average weekly earnings during the previous twelve months, if he has been so long employed, but if not, then for any less period during which he has been in the employment of the same employer, such weekly payment not to exceed one pound."

Dec. 13. *Joseph Walton, Q.C.*, and *Atherley Jones, Q.C.* (*Richard Smith* with them), for appellant. It is admitted between counsel that the terms of the employment were that the employer could give the men notice on any night that they would not be wanted the next day, and similarly that the men could give the employers notice. This case and the next case (Stuart's) substantially raise the same point, namely, whether the Workmen's Compensation Act, 1897, restricts the compensation to employment by the week or for weekly wages, and lasting for two weeks at least. The Court of Appeal took this extremely narrow view of the Act. But, badly as the Act is drawn, there is no need to restrict its application in this way. The Act, in ss. 1, 2, and 7, names the conditions precedent to the right to compensation, namely, disablement for at least two weeks, the absence of serious and wilful misconduct of the injured man, notice of the accident, &c. It nowhere says that employment by the week or for weekly wages or for any defined period is a condition precedent. It says that the employer shall be liable to pay compensation "in accordance with the First Schedule." That is to say, the amount is to be calculated according to the enactment in that schedule, where the terms admit of it. Compensation does not depend on the length of time the man has been employed: where the wages earned have varied from week to week, there an average must be taken: where they have been uniform or where there has been employment for only one day or for several days at the same rate, there is no need to take an average. The construction adopted by the Court of Appeal reduces the Act to an absurdity.

Cripps, Q.C., and *F. H. Mellor*, for respondents. The Act

H.L. (E.) 1900

LYSONS v. ANDREW KNOWLES & SONS, LIMITED.

STUART v. NIXON & BRUCE.

is no doubt badly drawn, but that is no reason for importing into it words that are not there, which the appellant's construction must do. The schedule is quite plain and distinct in its enactment that the amount of compensation shall depend upon "the average weekly earnings," and no amount of juggling with words can eliminate those words from the statute. The principle runs through the whole of ss. 1 and 2 of the schedule, and applies equally to the case of death and the case of total or partial incapacity for work. If these plain words are disregarded, the words "in accordance with the First Schedule" are set at naught. The Act may be capricious in including weekly employment and excluding daily, but it is capricious in many ways. The plaintiff at most is entitled only to 12*s.*, for he worked during parts of two weeks, and his weekly average was 6*s.*, not 12*s.* (see p. 80).

Joseph Walton, Q.C., in reply.

The House reserved judgment till the next appeal was heard.

In the second appeal, *Stuart* v. *Nixon & Bruce*, the respondents were stevedores, and were loading a vessel in a dock by means of a winch, derrick, and fall. The appellant's husband was in the course of his employment "finishing off" a hold on board the ship which had just been filled. The finishing off was putting two iron cross-beams across the hatchway. They had to be slung into position by means of the winch, derrick, and fall, which were all on board the ship. The fall got entangled; the appellant's husband went to disentangle it, and the fore and after beam canted and jerked him down into the hold. He died on October 8. The deceased was a "casual labourer," not working continuously for one firm alone, and his average weekly earnings, taking one week with another, were 35*s.* a week. At the time of the accident (September 15, 1899) he had been employed for five days continuously at daily wages by the respondent. The deceased's widow, the appellant, having claimed compensation for herself and two of her children as wholly dependent, and for the other two children

as partly dependent upon the deceased's earnings, the county court judge for Lancashire (Liverpool) found the facts above stated, and held that the deceased was not within the Act—first, because he was a "casual" labourer, and had been employed for five days only, being paid by the day; secondly, because the machinery was not, in his opinion, used in the process of loading or unloading at the time of the accident; that "putting a cork in a bottle after it has been filled is no part of the process of filling the bottle." The Court of Appeal (Collins, Vaughan Williams, and Romer L.JJ.) affirmed this decision on the first ground. (1)

The widow appealed.

By the Workmen's Compensation Act, 1897 (c. 37), s. 7, sub-s. 1, "This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a . . . . factory. . . ."

By sub-s. 2, "'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, ..."

"'Undertakers' in the case of a . . . . factory—means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895. . . ."

By the Factory and Workshop Act, 1895 (c. 37), s. 23, sub-s. 1 (ii.), "The provisions of the Factory Acts, with respect to accidents; . . . shall have effect as if (*a*) every dock, wharf, quay, and warehouse, and, so far as relates to the process of loading and unloading therefrom or thereto, all machinery and plant used in that process . . . . were included in the word factory, and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within

(1) [1900] 2 Q. B. 95.

H. L. (E.) 1900

LYSONS v. ANDREW KNOWLES & SONS, LIMITED.

STUART v. NIXON & BRUCE.

the same or forming part thereof, and the person so using any such machinery shall be deemed to be the occupier of a factory."

Dec. 13, 14. *Joseph Walton, Q.C.*, and *Leslie Scott*, for appellant. This appeal, besides raising the point arising in *Lysons' Case*, and which need not be further argued here, raises the question whether the deceased was employed in loading the vessel from a dock, wharf, &c., within the meaning of the Factory and Workshop Act, 1895, s. 23, sub-s. 1 (ii.). It seems clear that the loading of a vessel is not complete till the hold is in the men's phraseology "finished off," and the cargo made secure by covering the hatchway. The illustration given by the county court judge of filling a bottle is apposite for the appellant's contention. Imagine champagne or port being "bottled" without corking.

Ruegg, Q.C., and *A. G. Steel*, for the respondents, contended that the decision of the county court judge on both points and the decision of the Court of Appeal on the only point they decided were right.

Joseph Walton, Q.C., in reply.

EARL OF HALSBURY L.C. My Lords, in these cases I think it is impossible not to recognise the fact that the Act of Parliament which your Lordships are called upon to construe is one which from time to time presents difficulties of construction. I am not surprised that the Legislature, having a somewhat difficult problem to solve, has used language which does require consideration to give it its true signification. From time to time it was met in the course of manufacturing this Act of Parliament with difficulties that were sought to be solved by the use of words which were, perhaps, not the best chosen, and which have raised some difficulties in the construction of the Act.

My Lords, the broad proposition of course was that the Legislature intended that there should be compensation given to every workman in certain trades when an injury happened to him in the course of his employment, subject to certain

exceptions which are not relevant to the question now under debate. The language in which the right was given must be looked at, I think, with care to see whether the language was (as it appears in the first instance) intended in its universality, or was intended to be cut down, as is contended, to a very limited right by sections or phrases in the schedule. Certainly, whatever other difficulty there may be in construing the language as it stands, it would be, I think, more difficult still if we were to introduce these qualifications upon the right.

Now, in the view which I suggest to your Lordships, I think the language is simple enough, and if one looks at what I might call the framework of the legislation which is intended to be applied, I think there is not so much difficulty as has been contended with regard to this particular provision. The language is this: "If in any employment to which this Act applies personal injury by accident arising out of and in the course of the employment is caused to a workman, his employer shall, subject as hereinafter mentioned, be liable to pay compensation." That I regard as the affirmative or leading enactment. What follows appears to me to be equivalent to a statement that the mode in which that compensation is to be ascertained and determined is to be according to the method and manner provided for in the schedule. The language itself (I do not want to undervalue the argument) is "liable to pay compensation in accordance with the First Schedule to this Act." The first thing, I think, one has to do is to apply one's mind to what is the substantive intention and meaning of this statute. Does it mean that every workman, whoever is employed in one of the prescribed trades, shall be (subject to certain conditions not relevant to the matter now under debate) entitled to compensation? Or does it mean that only workmen shall be entitled to compensation in respect of whom it is possible to say that the periods of their employment and the mode in which they are paid will render it possible to establish an average weekly payment, so that anybody who comes outside that category is not entitled to any compensation at all? My Lords, for my own part I cannot entertain a doubt that the Legislature did mean that every workman in the

H. L. (E.) 1900 LYSONS v. ANDREW KNOWLES & SONS, LIMITED. STUART v. NIXON & BRUCE. Earl of Halsbury L.C.

prescribed trades should be entitled to compensation, and I think that is the language which one would naturally expect to have been used by the Legislature if that was the meaning of the enactment. But now it is said that the language of the enactment is that he is to "be liable to pay compensation in accordance with the First Schedule to this Act." It is to be observed that even upon that language it is not such compensation as is enacted in the schedule, but "in accordance with the First Schedule to this Act"; and when we look at the First Schedule of the Act, we find that there are a variety of provisions which are very intelligible indeed, if we take what I say is the leading enactment, that every workman is entitled to compensation.

But it is said: if a workman is not employed for at least two weeks, how can you average his earnings or his agreed earnings by an "average" which, when you have only got one term, is an impossible phrase. Well, my Lords, for my own part, if I came to the conclusion that there had been no mode by which the quantum should be fixed in the schedule, I should still be of opinion that there was no repealing of the right which had first been granted, but that, by arbitration or by some other means which I think would be quite within the powers of the Act, the compensation should be ascertained; because I do not look upon the provision made in respect of the compensation as one which, either in language or in the intention of the Legislature, was meant to cut down and override the primary right given to every workman to compensation, but I regard it as a mode of ascertaining what the quantum was to be. And I think if one looks at the whole framework of the schedule it is intelligible enough why those modes of calculation were adopted. In the first place it will be remembered that no compensation is due to any one unless he is disabled for a period of two weeks, the intention thereby being to exclude all trifling injuries. In the next place, assuming that the person is entitled to compensation during the period in which he is unable to work and support himself, the Legislature obviously had in its mind this, that the man was not to be left without provision during such period as he was laid up by reason of the

accident, and they enacted that payment—it is described as a "weekly payment"—should be given to him. Then I suppose it occurred to everybody who was dealing with the mode in which the Act was to be administered, and considering how the relief was to be given, that you must in some way or another find out what was to be the weekly payment if it had relation to his earnings or wages. It was obvious, I should think, to any one, that everybody is not paid by the week, that you cannot have the exact thing made ready to your hand to enable you to find out how much the weekly payment is to be. You must split up that which is what I call the aggregate payment, whether it is by the year, or the month, or what not, into such proportions in relation to his weekly earnings that the week's payment, or rather, as it was described, the payment in respect of the week, should be arrived at. How was that to be done? It seems to me that the Legislature, in using the phrase that you must take the average of the earnings for the week, did not in the least mean to limit and cut down the right of the disabled labourer to have his compensation, so that if you had a difficulty in the arithmetic he was not to get it at all; but it provided an artificial means of finding out what that quantum was to be, and that was no doubt by the use of the word "average."

I do not myself feel very much impressed by the discussion that we have had as to what the word "average" strictly means. I think in ordinary popular parlance when you talk of a man, if he has earned irregular wages, whether unequal wages or equal wages, you would say, speaking of a yearly servant, that on the average he got so much a week or so much a month, as the case might be. I think it was in that popular sense, taking one day with another or one week with another, that the Legislature used those words, and I think it is what everybody would understand by "average" that his earnings were so much—not his agreed earnings by contract, there it would be definite—that if a man was only employed at irregular intervals or at irregular amounts you were to get at what the average was by putting them together and striking an average so as to afford a test of the weekly sum to be paid. That, my

H. L. (E.)
1900
LYSONS
v.
ANDREW KNOWLES & SONS, LIMITED.
STUART
v.
NIXON & BRUCE.
Earl of Halsbury L.C.

Lords, seems to me to account for the language in which the Legislature has couched its enactment.

The alternative is this, that you are to suppose that the statute, giving a right in the language which I have read, intended to exclude the enormous class of day labourers and persons not in regular employment but only irregularly employed from time to time, unless you could strike the average of a fortnight's employment. Now, my Lords, looking at the language of the statute and the mode in which what may be described as the initial right is given, I should shrink very much from such a construction, and I am unable to concur with the Court of Appeal. The Court of Appeal undoubtedly does say in words that they can give no account or reason why the statute should be so construed, and that seems to me to be rather an admitted weakness when you are construing a statute, that you are compelled to say: I so construe it, but why I am wholly unable to conjecture. It appears to me that there is a very reasonable ground upon which you should adopt the construction which I have suggested to your Lordships, and if that is so, the first case with which your Lordships are dealing would be decided in favour of the plaintiff, reversing the Order of the Court of Appeal.

My Lords, the next case (*Stuart* v. *Nixon and Bruce*) raises a point which is peculiarly its own. In so far as it touches the question with which I have now dealt it is disposed of by what I have already said, but it raises also a point which is peculiarly its own. If I understand the facts (and it is not at all immaterial to consider what the exact facts found or intended to be found by the county court judge are), the fact is that the stevedore was engaged in loading this vessel—I will not say the loading was incomplete, because that would be assuming the question which I propose to deal with, but all the cargo was stowed in. The beams which form an essential part of the vessel and the hatchways, which are to preserve both the safety of the vessel and the safety of the cargo, had not been put in, and in the course of the operation of putting those beams in which form part of the necessary support of the hatchways, the person who was engaged in that

operation, whose widow is suing here, was killed. He was engaged in the operation which I have described. Now, first of all, was he engaged in the action of "loading"? I should think very few people would describe the work he was then doing as anything else. It is true that at that particular moment he was engaged in putting in their place the beams which formed part of the covering of the vessel and not actual parts of the cargo which was being carried. When you find the word "loading"—I will deal presently with the other words upon which one of your Lordships, I am afraid, entertains some doubt—I say, so far as the word "loading" is concerned, can any one doubt that the whole operation was intended to be included within the words of the enactment? I should have thought it was impossible to doubt it. Nor do I entertain any difficulty about the stevedore being the person who was doing it. I could quite understand that if the crew was engaged in doing it it could be said that, although the joint action of the stevedore and the crew was "loading," yet the stevedore was not loading but the crew were in respect of this particular matter. First of all as regards the thing done, can it be reasonably contended that the putting in of the hatchway and completing the safety of the vessel and the safety of the cargo by this means was not a loading of the vessel? Would anybody say that if the stevedore had undertaken to completely load such and such a vessel, if he had left the hatches off and not put the beams in for the purpose of securing the hatchways, he had completed his contract? It may be the same question, perhaps, but only a different form of putting it. I should myself entertain no doubt that it was part of the duty of the person loading the vessel to put on the hatchways just as much as to put in the bags in any particular part of the hold.

But then, my Lords, comes this question. By a very singular application of the fashion of legislation by reference, the Legislature has made certain machinery for loading or unloading to or from a wharf, &c.—not machinery of a factory—but it has made it by statute a "factory" itself, and the person using the machinery is to be the person in control

H. L. (E.) 1900 LYSONS v. ANDREW KNOWLES & SONS, LIMITED. STUART v. NIXON & BRUCE. Earl of Halsbury L.C.

of the factory so as to establish the legal liability. I admit that the statement of that legislation is somewhat grotesque, but that is what the Legislature has done. The county court judge not unnaturally shrank from adopting what the Legislature has done, but I am afraid neither a county court judge nor your Lordships' House have any right to criticise what the Legislature has done. We must administer the law as it is, and if the Legislature has thought proper to make machinery so used a "factory," your Lordships must assume it to be a factory for the purpose of any decision at which your Lordships can arrive.

Then there arises another and a more subtle point upon which one of your Lordships, I think, entertains some doubt. The language of the statute is that the person so engaged must be either loading or unloading to or from a wharf. Now, the criticism as I understand it is this, that at the particular moment when this accident happened there was no operation that could properly be described as loading or unloading to or from a wharf. All the bags were in, and the only thing that remained to be done was that which I have described, and therefore the particular machinery which, only while used in loading or unloading to or from a wharf becomes a "factory" with all the consequences incident thereto, was not at that moment a factory. That was the argument. But, my Lords, to my mind that is putting far too narrow a construction upon the words of a statute which was passed before the Workmen's Compensation Act and which was intended to be a protection to the workmen in peculiarly dangerous operations. Amongst other things, one operation which the Legislature thought it right to protect was the operation of loading or unloading to or from a wharf. With respect to the other parts of this transaction no question is raised as to the Act applying; but the words "to or from a wharf" are suggested to exclude the particular moment when this transaction took place.

My Lords, taking a broad view of that question, I should have thought it was impossible to suppose that the Legislature intended to confine the protection of workmen to the exact moment when a bag was being either lowered from or to a

wharf. Surely what they intended to protect the workmen from was the danger of an operation, in the ordinary course of such transactions when something is being done, not limited to the exact moment, but, speaking of the whole transaction—when the transaction is being effected of loading or unloading from a vessel to a wharf. Various points have been put in the course of the argument, and it has been, I think, with great force argued, Does anybody suppose that it is only while the machinery has actually a bag in its clutches that the Act applies? When it is swinging back again itself empty, or when it is descending into the hold to get a bag, although there is not a bag attached to it, is not that loading or unloading? Literally it is not, and if the same criticism is to be applied each of these transactions must be held to be outside the Act of Parliament, because at that moment no bag was either being loaded or unloaded. I cannot think that that is the proper way to construe a statute passed with that object in such language. The loading or unloading must be treated as a whole transaction, as men in business in ordinary life would regard it. How was the man employed? He was employed in loading or unloading the vessel, although at the particular moment he may have been standing still and doing nothing. I think the words "loading to or from a wharf" are satisfied by the fact that the men were engaged in this transaction—I was going to say it was ancillary to the main transaction of loading or unloading, but I think that would be an inadequate statement of it, because I think it is part of the loading and unloading. It is part of the operations which the human labour is engaged in, in doing the very thing the Legislature contemplated as requiring this protection, and, therefore, I think this point also fails and that the plaintiff is entitled to judgment.

My Lords, for these reasons I move that in both these cases your Lordships should reverse the decision of the Court below.

LORD MACNAGHTEN. My Lords, I am of the same opinion in both cases.

In the second case (*Stuart* v. *Nixon & Bruce*), as regards the question whether the workman who was killed was engaged in

H. L. (E.)
1900
LYSONS
v.
ANDREW KNOWLES & SONS, LIMITED.
STUART
v.
NIXON & BRUCE.
Lord Macnaghten.

an employment to which the Act applies, I have only to say that I have no doubt that he was. He was employed in the process of loading from a wharf, and employed about machinery used for or in relation to that process. In my opinion the operation in which he was engaged at the time was part of the process, and the process was not complete until that operation was finished.

As regards the more substantial question at issue I must say that I do not feel pressed by the difficulty which presented itself to the Court of Appeal. It is all important to bear in mind that the right to compensation is given by the Act, not by the schedule. The conditions which must be fulfilled in order to support a claim to compensation are to be found in the Act itself. The Court of Appeal has added another condition which is not contained in the Act, which is not expressed in the schedule, but which it is said may be discovered there. The right to compensation, as I said, is given by the Act, but the compensation is to be "in accordance with" the schedule. The words are not "as defined by the schedule," or "in the terms prescribed by the schedule," but "in accordance with the schedule." Those words, as it seems to me, import a certain latitude. The degree of latitude—if I may borrow the language of my noble and learned friend on the woolsack when discussing the same words in the Bills of Sale Act in *Thomas* v. *Kelly* (1)—it would be difficult if not impossible to define. But there is no great difficulty in dealing with the words in a concrete case. At least, they seem to convey a warning or an intimation that you are not to cling so closely to the letter as to defeat the declared purpose and object of the Act.

I have no doubt that if Parliament had intended to impose the condition which has been discovered in the schedule, the condition would have been inserted in the Act. But it would have been a most extraordinary thing if such a condition had been imposed. In the case of a workman working at a dangerous trade, I suppose the periods of greatest danger are the period at the commencement before he is familiar with his work, and the period when he becomes so

(1) (1888) 13 App. Cas., at p. 511.

familiar with it as to be careless of danger. But of the two I suppose the commencement is the more dangerous. Now I cannot imagine that Parliament, when it was giving this boon to workmen, would have thought of saying that no compensation shall be paid if the accident happens during the most dangerous period of the workman's employment. Still less can I suppose that Parliament would have left such a condition to be inferred from a single word in the schedule, and that word (to say the least) not used with perfect accuracy.

Turning now to the schedule, there are, I think, three things to be noticed. In the first place, I agree with Mr. Joseph Walton that where death results from the injury, and the workman has left dependants, the compensation must be at least 150*l*. It is to be 150*l*., or a sum equal to either the actual amount or the hypothetical amount of his earnings for the three years immediately preceding the accident, not exceeding in any case 300*l*. But if the workman has not served the full period of three years, and if you could not find a basis on which to calculate the hypothetical amount, the compensation would, I think, still be 150*l*. So that according to the view of the Court of Appeal, if an accident happens to a workman before he has been employed for a fortnight the sum of 150*l*. is payable in case of death, but not one farthing in case of total and permanent disability.

In the next place it is clear that the word "average," which has given rise to all this difficulty, is not used accurately. If the rule which the Court of Appeal has laid down were applied strictly, it seems to me that a disabled workman who had served for a year at an unvarying rate of wages, and had earned his wages week by week, would not be entitled to compensation at all. You might add up his wages for a year and divide by fifty-two, but you would not get an average, because there would be no variations between which you could take the mean.

Lastly, the word "average," as was pointed out by Mr. Walton and Mr. Scott, occurs also in the 2nd sub-section, and it is difficult to suppose that it is used there with the effect attributed to it in the Court of Appeal. If this case happened—

H. L. (E.)
1900
LYSONS
v.
ANDREW KNOWLES & SONS, LIMITED.
STUART
v.
NIXON & BRUCE.
Lord Macnaghten.

if a claim to compensation was made by a person partially incapacitated, and if at the time of the claim he had returned to work and was earning just half what he was earning before, but had only been at work for one week, you could not, according to the view of the Court of Appeal, take those earnings into consideration and make a set-off against the compensation claim—that would surely be unfair and unreasonable.

All this seems to shew that the word "average" is used very loosely in the schedule. The obvious meaning, I think, is that you are to take a week's earnings as the unit of calculation; but if there has been a series of weekly earnings of different amounts, you are to take an average, and the unit will then be not an actual week's earnings, but a hypothetical week's earnings. You are to take one week with another, as my noble and learned friend Lord Robertson observed. The table of compensation rates is not worked out completely: it is rather sketchy perhaps; but the meaning, I think, is plain enough.

I am, therefore, of opinion that the judgment of the Court of Appeal must be reversed in both cases, and the claims of the appellants allowed with costs.

LORD SHAND. My Lords, I have no difficulty in concurring in both cases in the decision at which your Lordships have arrived. I confess that in the earlier part of the argument I felt there was considerable force in the view which had been taken by the Court of Appeal, that one day's wages only does not, strictly speaking, give the means of striking an average, and that in a case where there was one day's work only it was very difficult to get at the average weekly earnings in the ordinary sense, because you require several occasions at a different or, it may be, at the same rate of wages, in order to enable you to strike an average. But I am satisfied that, for the reasons which have been stated by my noble and learned friends the Lord Chancellor and Lord Macnaghten, the term "average" is used not with strict accuracy but loosely in this statute. It appears to me that, as the Lord Chancellor said, if it had been intended to strike out of the Act men who were in the same employment under the same employer, and it may be

who were present at the same accident, but who had only worked for one day, so that there should be no compensation for them, looking at the broad terms to which the Lord Chancellor has referred of the statute itself, it would have required a direct provision to that effect. It would not be lurking in the schedule, which merely fixes the rate of compensation to be given, that you would find an absolute exclusion of the right altogether. I go with the argument upon that point, that it would not be a matter to be taken as a mere inference, but would be found in the language of direct enactment.

In the next place, my Lords, it appears to me that you read the provision quite fairly when you propose to get at "the average weekly earnings" by taking that which the man has made in the week in that particular employment, which is only the wages for a particular day.

On these grounds, and adopting the reasons given by the noble and learned Lords who have gone before me, I am of opinion that the decision of the Court of Appeal ought to be reversed.

LORD DAVEY. My Lords, your Lordships have had before you in the course of this session, and earlier, several appeals on this extraordinarily ill-drawn Act, but I do not know that your Lordships have had one of greater importance or greater difficulty than the one before you. The difficulty really arises from this, that the draughtsman has apparently not worked out the scheme which he had in his head, and it looks very much as if the Act had really been framed from notes of legislative intention, and had not been expanded into the proper legislative language. Cases which have arisen and cases which are likely to arise appear not to have been contemplated, but apparently were supposed to be covered by the general language used in the Act. My Lords, I have made this observation because I think it is the key to the difficult question of construction upon which the Court of Appeal have expressed their opinion.

Now, my Lords, I turn to the examination of the Act, and I entirely agree with what has been said by my noble and learned friend on the Woolsack, that you ought to construe this Act so

H. L. (E.)
1900
LYSONS
v.
ANDREW KNOWLES & SONS, LIMITED.
STUART
v.
NIXON & BRUCE.
Lord Davey.

as, as far as possible, to give effect to the primary provisions of it. In the first Act I find (I will not read it again; it has been already read) that the employer subject to the provisoes is made liable to pay compensation, and it goes on, "in accordance with the 1st schedule to this Act." Now, my Lords, I confess I should not read those words, "in accordance with the 1st schedule to this Act," as being restrictive of the obligation upon the employer to pay compensation. I should not consider that those words limited or restricted the right of the workman to receive compensation, or the obligation upon the employer to pay compensation, but as being intended to denote the manner and mode in which that compensation was to be carried into effect. You may substitute for the words "in accordance with the 1st schedule" the actual title of the 1st schedule, and then the meaning which I attach to it would be perfectly clear, "in accordance with the scale and conditions of compensation contained in the 1st schedule"; that is to say, it is an expression of the mode and scale on which the amount of compensation is to be ascertained; the *amount* of compensation, not the right to it, is to be ascertained, and of the conditions upon which, when it is ascertained, it is to be enjoyed.

My Lords, the Court of Appeal have found that those words, having regard to the construction that they put upon certain words in the schedule which have been referred to, attach a condition, and a most material condition, to the right to compensation, namely, that no workman should be entitled to compensation unless he has been in the employment of his present employer for a period exceeding two weeks.

Now, my Lords, if it were intended to restrict the compensation given by the Act to workmen engaged at least two weeks by the same employer, you would expect to find it in the Act, and you would expect to find it as a qualification of the right given by the Act; you would expect to find it in some way limiting or qualifying the description of workman who is to be entitled to compensation. But you find nothing there at all, and even if I came to the conclusion that the construction put by the Court of Appeal on the schedule was the right one, I

should say that this was a casus omissus which had been overlooked in framing the schedule, and that the right being given by the statute, there was nothing in the schedule to take away the right, and that the Court must find some other means of arriving at the amount and conditions upon which it was to be enjoyed so far as the schedule was inapplicable to the case.

Now, my Lords, if you turn to the schedule itself, what do you find? You find in the first place that it is intituled "Scale and Conditions of Compensation." I have referred to that. Then the first section in the schedule is "The amount of compensation under this Act shall be," &c., and the clauses which have to be construed follow after that enactment. Obviously the only object of those sections in the schedule was to fix the amount of it, and not in any way to qualify, restrict or modify the right to compensation.

Then, my Lords, going on with the 1st schedule, it was suggested that it might come under the term "Conditions," but that I construe to mean, reading it with the word "Scale," the conditions of enjoyment—not the conditions upon which the right is given, but the conditions under which the right given in the body of the Act is to be enjoyed. And I find, on looking through this schedule, numerous conditions; for example, in clauses 3 and 11 there are provisions for the workman's submitting himself for medical examination; in No. 5 the question as to who is a dependant is to be settled by arbitration; in 12 the weekly payments may be reviewed from time to time; by 13 they may be redeemed by the payment of a lump sum; and 14 provides that they shall not be capable of being assigned to any other person; so that you find the word "conditions" amply satisfied, and the character of the conditions which is intended is shewn by the actual enactments contained in the schedule itself.

My Lords, when I come to the words which have to be construed in both these cases I really have very little to say that has not already been said by my noble and learned friend on the Woolsack and my noble and learned friend opposite (Lord Macnaghten). Shortly put, I think the draughtsman

H. L. (E.) 1900 LYSONS v. ANDREW KNOWLES & SONS, LIMITED. STUART v. NIXON & BRUCE. Lord Davey.

intended this: The draughtsman saw that in many cases the actual weekly wage would not always be of the same amount, and that therefore it was necessary in some cases, and probably in most cases, to take an average, and he has used a compendious formula or compendious expression which was intended to include the simple case as well as the more complicated case of the actual weekly wage being of a different amount. I do not say it is good drafting—I do not say that it is free from difficulty; but on consideration of all the circumstances I think that that is the proper way of construing it. The weekly earnings are to be the basis upon which the compensation is to be assessed. If you have the actual regular weekly earnings you do not want to inquire any further, but if the weekly earnings have differed in one week with another, then you require to strike an average in the ordinary way. As my noble and learned friend opposite has pointed out, if the weekly earnings were uniform throughout the year, you cannot talk of the average weekly earnings of a person who has had 1*l.* a week throughout the year; you would not say his average wages were so and so, you would say his weekly wages were so and so. So it is impossible to attach the accurate and logical meaning of the word "average" to the enactment which you find in this schedule. Being of that opinion, I agree that the decision of the Court of Appeal should be reversed, and in one case the decision of the learned county court judge be restored. In the other case I do not know whether it must go back for a new arbitration, but the amount must be ascertained in some way.

My Lords, with regard to the case of *Stuart* v. *Nixon & Bruce* I have only to add that I entirely agree with what has been said, that the injury to the workman was in the course of the process of loading the vessel from the quay. Notwithstanding that the actual putting of the goods into the hold has been completed, I think this was "relating to" "the process"—in fact, I find an admission before the learned county court judge that the process was incomplete without the putting in of these beams. I do not place much reliance upon that, because it is obvious that the county court judge understood it differently

from its primâ facie meaning, but I think the admission is correct, and it is exactly the language which I should choose to adopt myself. If the two operations had been in fact severed and the one had been done by a contractor, and the other had been done by the master of the ship, that might not have been so; but where we find it done by the stevedore, I think it was done by him as part of the process of loading the ship.

LORD BRAMPTON. My Lords, entirely agreeing as I do with the judgments which have been pronounced, I have no word to add. I agree with all that has been said by my noble and learned friends who have exhausted the case. I propose therefore to do no more than express my concurrence.

LORD ROBERTSON. My Lords, the interpretation clause of this Act defines "workman" in language of the extremest latitude as regards the nature of the contract under which he works, and in that section and in the rest of the Act as distinguished from the schedules there is no hint or suggestion that it is limited to persons who have worked for any particular period prior to the accident. The 1st section of the Act declares the employer to be liable to pay compensation in accordance with the 1st schedule to every workman who has sustained personal injury by accident arising out of and in course of the employment. Having regard to the subject-matter of the schedule and its place in the scheme of the Act, it would be most surprising if the schedule should prove to contain some limitation of the class of persons benefited. Mr. Scott is, I think, quite right in saying that the "conditions" laid down in the schedule are none of them conditions precedent to the right to compensation, but are all conditions of the exercise of the right by persons assumed to possess it. Now, the basis of the respondents' contention is the words "average weekly earnings," and ultimately the single word "average," and I think it wholly insufficient to support so considerable a burden. All that the Act itself says is that every workman injured in the circumstances stated is to get compensation in

H. L. (E.) 1900 LYSONS v. ANDREW KNOWLES & SONS, LIMITED. STUART v. NIXON & BRUCE.

accordance with the schedule, and it is completely in accordance with the schedule that the man whose weekly earnings require no arithmetical computation to reduce them to a definite standard of compensation should receive compensation according to that standard. Supposing the words had been "weekly earnings, taking one week with another," it would be far too literal to hold that because a man had only worked one week, he would be excluded; and the word "average" expresses nothing more than the same idea.

LORD LINDLEY. My Lords, upon the main questions which have been argued before your Lordships, I agree with everything which has been said, and in particular I agree with the construction put upon the enacting part of the Workmen's Compensation Act and upon the expression "average weekly earnings" in the scale. To my mind the result arrived at by the Court of Appeal, to the effect that nobody can claim compensation under this Act unless he has been in the same employment for a fortnight, is startling and untenable.

With regard to the small point about the loading, I have the misfortune to be in a minority of one. But, my Lords, I cannot bring myself to say that the accident which happened here was occasioned on, in or about a "factory," which includes machinery loading from a wharf or quay. I do not say whether the loading was finished or not. I should say myself it was, as the county court judge held; but even if it were not, the process of loading *from a wharf or quay* was over and finished for ever. The accident happened by the use of a crane or a machine, not in completing that which was, according to my understanding of the case, at an end, but in a totally different operation, which was putting down the cross-bars (which were on the deck) over the hold of the ship with a view to place the hatchways over it. That point is a very small one, and I have no doubt, as your Lordships differ from me, I am wrong; but as my opinion on it is clear, I thought it right to express it.

My Lords, I take it for granted that the second case will not

have to go back, unless as a matter of form; because, as I understand the decision, the compensation must be 150*l.*

LYSONS *v.* ANDREW KNOWLES & SONS, LIMITED.

Order of the Court of Appeal reversed with costs here and below, and order of the county court judge restored with the variation of 24*s. instead of* 12*s.* (1)

Solicitors: *Radford & Frankland, for Bowden & Widdowson, Manchester; Rowcliffe, Rawle, Johnstone & Gregory, for Fullagar & Hutton, Bolton.*

STUART *v.* NIXON & BRUCE.

THE EARL OF HALSBURY L.C. My Lords, in this case I do not propose to say anything further. I have already given my judgment. The county court judge, taking the view he did of the law, has not assessed compensation, and therefore it must go back, because your Lordships have not the power to assess the compensation here. If it were done here consistently with the judgment, the judgment must be for the sum which, according to your Lordships' construction of the statute, must be the minimum sum. But I do not think your Lordships have jurisdiction to enter into that question. The only judgment I can move is that the case be sent back to the county court judge to find out, in pursuance of your Lordships' judgment, the amount of compensation which ought to be assessed.

Order of the Court of Appeal reversed with costs here and below. Cause remitted to the county court to assess the amount of compensation.

Lords' Journals, December 14, 1900.

Solicitors: *Crowders, Vizard & Oldham, for G. J. Lynskey, Liverpool; William Hurd & Son, for Oliver, Jones, Billson & Co., Liverpool.*

(1) When this report went to press the order of the House had not been drawn up, a question having been raised as to the variation from 24*s.* to 12*s.*

[HOUSE OF LORDS.]

H. L. (E.) 1900 Dec. 14.

COOKE . . . . . APPELLANT;

AND

THE CHARLES A. VOGELER COMPANY RESPONDENTS.

Bankruptcy—Jurisdiction—Foreigner resident Abroad but Trading in England—Act of Bankruptcy—"Debtor"—Assignment executed Abroad for Benefit of Creditors generally—Notice of Suspension of Payment—Bankruptcy Act, 1883 (*c.* 52), *s.* 4, *sub-s.* 1 (*a*), (*h*); *s.* 6, *sub-s.* 1 (*d*).

The Court of Bankruptcy has no jurisdiction to make a receiving order against a foreigner resident abroad who, without coming into the jurisdiction, has in this country had a place of business, contracted debts, and acquired assets, and has executed abroad an assignment of his property for the benefit of his creditors generally. Such a person is not "a debtor" within the meaning of the Bankruptcy Act, 1883, s. 6, sub-s. 1 (*d*).

The decision of the Court of Appeal, reported as *In re A. B. & Co.*, [1900] 1 Q. B. 541, affirmed.

THE respondent company consisted of two American subjects who resided and traded at Baltimore, U.S. Through their manager, Geddes, they carried on a branch of their business in England and had assets there, but they had never resided in England. In December, 1899, the respondents executed in Baltimore a deed of assignment of all their property to Dulaney, their manager there, in trust to pay their debts. In January, 1900, Geddes wrote to the appellant (to whom the respondents owed a large sum for debts contracted in England) that he could not pay. The appellant, who resided in England, presented a petition for a receiving order against the respondents (Devries and wife), alleging that they had committed acts of bankruptcy, namely, (1.) given notice that they had suspended or were about to suspend payment of their debts; (2.) made an assignment of their property to a trustee for the benefit of their creditors generally. The registrar dismissed the petition with costs, and this decision was affirmed by the Court of Appeal (Lindley M.R., and Rigby and Vaughan Williams L.JJ.). (1)

(1) [1900] 1 Q. B. 541.

By the Bankruptcy Act, 1883 (c. 52), s. 4, sub-s. 1, "A debtor commits an act of bankruptcy in each of the following cases:—

"(*a*) If in England or elsewhere he makes a conveyance or assignment of his property to a trustee or trustees for the benefit of his creditors generally: . . . .

"(*h*) If the debtor gives notice to any of his creditors that he has suspended, or that he is about to suspend, payment of his debts."

By s. 6, sub-s. 1, "A creditor shall not be entitled to present a bankruptcy petition against a debtor unless— . . . .

"(*d*) The debtor is domiciled in England, or, within a year before the date of the presentation of the petition, has ordinarily resided or had a dwelling-house or place of business in England."

Aug. 2. *Sir R. T. Reid, Q.C.*, and *Herbert Reed, Q.C.* (*Muir Mackenzie* with them), for the appellant. The respondents were debtors within the meaning of ss. 4, 5, and 6 of the Bankruptcy Act, 1883. Sect. 4, sub-s. 1, (*a*), (*b*) and (*c*), specifies as acts of bankruptcy certain acts if committed "in England or elsewhere." It is not contended that the territorial law will bind people who are not within the jurisdiction, but for the purposes of bankruptcy the respondents were within the jurisdiction, as within a year of the bankruptcy petition they had a place of business in England. If the foreigner is here he can be served; if not there are rules made for service abroad. A foreigner may be served with a writ and is liable to execution for debt. Bankruptcy is nothing more than statutory execution, and from an international point of view there is no difference between an individual execution and an equitable cessio bonorum or bankruptcy. An English bankruptcy would be no answer to a claim for debt in America, nor would a colonial or foreign bankruptcy be a good plea here. There are many cases of double bankruptcy. Doubtless bankruptcy is a status: but a status in England and nowhere else. The only object is to prevent the scramble of a cessio bonorum: there is no interference with international comity in making a foreigner

H. L. (E.) 1900 COOKE v. CHARLES A. VOGELER COMPANY.

bankrupt. The respondents are "debtors" within the meaning of the Act. They come clearly within s. 6 of the Act of 1883, of which, though the words are negative, the effect is positive. No person is to present a petition unless within a year the debtor has had "a place of business in England." The respondents had such a place. The decision below makes s. 6, sub-s. (*d*), meaningless.

[LORD DAVEY referred to Lindley on Companies, p. 622 and p. 652, with respect to foreign companies with an office in this country.]

The procedure in bankruptcy is analogous to that in winding up; and a winding-up order has been made of an Australian company with an office in London: *In re Commercial Bank of South Australia* (1); and the pendency of a foreign litigation does not affect the jurisdiction: *In re Matheson Brothers, Limited.* (2) An instance of a foreign company so wound up is the *Mexican and South American Mining Co.* (3); *Madrid and Valencia Ry. Co.* (4)

[LORD DAVEY referred to *Gibbs & Sons* v. *Société des Metaux.* (5)]

The broad proposition is that those who are liable to English process are liable to bankruptcy. There is a "commercial" domicil for this purpose, and those who enjoy liberty to trade must be amenable to bankruptcy—the inevitable issue of unsuccessful trade. There is no reason why foreigners should enjoy the exceptional privilege of exemption from the bankruptcy laws.

The cases before the Act of 1883 are in strictness irrelevant. That Act was intended as a code, and its scheme is different from that of the Act of 1869. Sect. 9 deals with the receiving order—a new element in the law. A receiving order does not at once alter status, and thus that argument is not available to the respondents. The official receiver is in the position of a receiver in the Court of Chancery. The effect of the Act of 1883, in the words of Brett M.R. in *Ex parte Reynolds* (6), is

(1) (1886) 33 Ch. D. 174.
(2) (1884) 27 Ch. D. 225.
(3) (1858) 26 Beav. 172.
(4) (1849) 3 De G. & Sm. 127.
(5) (1890) 25 Q. B. D. 399.
(6) (1885) 15 Q. B. D. 169, 186.

that "the whole previous legislation was swept away: the whole thing was made a tabula rasa." This being so, the reasoning in *Ex parte Pearson* (1), founded on *Ex parte Blain* (2), falls to the ground, and the earlier case, which the Court of Appeal followed, was wrongly decided. *Ex parte Blain* (2) was founded on s. 6 of the Bankruptcy Act, 1869, which is substantially different from s. 4 of the Act of 1883, read in conjunction with s. 6 (*d*). These sections expressly provide, as the Act of 1869 did not, for the case of a foreigner, as the debtor need not be domiciled if he has "a place of business in England." Moreover, both in Blain's case and Pearson's case the meaning of the term "debtor" is unduly limited. There is no authority for saying that the locus of the act of bankruptcy is the test. In *Ex parte Crispin* (3), where both petitioning creditor and debtor were foreigners, the question did not directly arise; but the observations of Mellish L.J., that a foreigner may be made a bankrupt here, are in the appellant's favour: see also *Ex parte Pascal.* (4) The Court of Appeal have in effect added to the statutory conditions by requiring that the act of bankruptcy must be committed here; whereas the Act says "in England or elsewhere." That the notice of the assignment made at Baltimore constituted an act of bankruptcy is shewn by *Crook* v. *Morley.* (5)

C. A. Russell, Q.C., and *Danckwerts, Q.C.* (*A. H. Carrington* with them), for the respondents. There is absolutely no authority for the proposition that a foreigner who has never been in this country is amenable to bankruptcy jurisdiction. To come within the process, the foreigner must either commit an act of bankruptcy here, or, having committed the act elsewhere, come to this country: see 1 Cooke on Bankrupt Laws, ch. 3, s. 4. There is nothing in later legislation or decisions to qualify this principle. Doubtless the status of bankruptcy is only a status in this country, but the man must be here for it to attach to him. This has been the rule in all the decisions from 21 Jac. to our own time, and is embodied in the reference found in the

(1) [1892] 2 Q. B. 263.
(2) (1879) 12 Ch. D. 522.
(3) (1873) L. R. 8 Ch. 374.
(4) (1876) 1 Ch. D. 509.
(5) [1891] A. C. 316.

H. L. (E.) 1900 COOKE v. CHARLES A. VOGELER COMPANY.

Bankruptcy Acts, including that of 1849, to "aliens and denizens," who for the first time were left out in the statute of 1869. In *Ex parte Blain* (1) the alleged act of bankruptcy was committed here, though, as in this case, the person proceeded against had not been in the country. But Brett L.J. says (2) distinctly that a non-resident foreigner cannot be made a bankrupt. In *Ex parte Crispin* (3) the debtor was in England and the act committed here: see also *Ex parte O'Loghlen.* (4) Further, there was no authority to Geddes to give notice of the suspension. In no case can the proceedings be of avail against the respondent, Mrs. Devries, who is a married woman not trading separately from her husband; and the Married Women's Property Act, 1882, does not apply.

Sir R. T. Reid, Q.C., in reply. The respondents' argument deprives of meaning the words "in England or elsewhere," and makes this country a sort of Alsatia, in which foreigners, if they are so minded, may cheat their creditors wholesale.

The House took time for consideration.

EARL OF HALSBURY L.C. My Lords, in this case the broad question arises whether a foreigner, who has never been in this country and has himself personally done no act within the jurisdiction of the Bankruptcy Court of this country, can be made bankrupt by reason of his having traded through an agent in this country, and having done an act in his own country which, if he had done it here, would undoubtedly be an act of bankruptcy. [His Lordship stated the facts.]

My Lords, the question is not a new one, and I think it has been uniformly decided that under such circumstances our bankruptcy law does not apply.

The question has been doubtless argued that the earlier decisions under the Act of 1869 are no longer decisive of the question, since the Act of 1883 uses different language, and in fact makes a different provision from that which was involved in the earlier statute.

(1) 12 Ch. D. 522.
(2) 12 Ch. D. at p. 529.
(3) L. R. 8 Ch. 374.
(4) (1871) L. R. 6 Ch. 406.

My Lords, I think the whole question must turn upon the language of the two statutes. I am by no means prepared to say that it might not be a reasonable thing to apply the English law of bankruptcy to a trader who, though himself personally abroad, exercised a trade through the instrumentality of an agent, and possessed assets in this country capable of being reached by bankruptcy administration. But a court of law has nothing to do with the reasonableness or unreasonableness of a provision, except so far as it may help them in interpreting what the Legislature has said. And although I think it might be very plausibly contended that if a trader chose by agent to come and engage in trade he ought to be made responsible, when he is unable to pay his debts, to the ordinary administration of the English law, since he had both property to be administered and had carried on his trading adventure in this country; on the other hand it must be admitted that bankruptcy and its incidents are intended to operate upon all the property that a defaulting debtor possesses, and further that the debtor himself is intended to be subject to an alteration of status by the fact of adjudication.

As I have said, however, I do not think it is the function of a court of law to choose between the alternatives presented by such considerations. If the law has intended, and has expressed its intentions, that a foreigner may be made a bankrupt under the circumstances of this case, no Court has any jurisdiction to disregard what the Legislature has enacted. And if, on the other hand, it is manifest that the language of the statute does not reach the case supposed, no Court has jurisdiction to enlarge the ambit of English legislation beyond what the Legislature has permitted.

I think the judgments of James L.J. and Sir George Mellish lay down a broad substantial rule in dealing with such questions, which I should be sorry to see departed from. English legislation is primarily territorial, and it is no departure from that principle to say that a foreigner coming to this country and trading here, and here committing an act of bankruptcy, is subject to our laws and to all the incidents which those laws enact in such a case; while he is here, while he is trading,

H. L. (E.)
1900
COOKE
v.
CHARLES A. VOGELER COMPANY.
Earl of Halsbury L.C.

even if not actually domiciled, he is liable to be made a bankrupt like a native citizen. And so, an Englishman by reason of his nationality is subject to the laws of his Sovereign wherever he may be. But the territoriality, so to speak, of the bankruptcy law is by necessary inference imported into both of the Acts to which I have referred, by the generality of its phrases. The words "debtor" and "creditor" certainly cannot be sufficient to give jurisdiction to the English Court of Bankruptcy, because if unlimited they would give jurisdiction all over the world in respect of debts, petitions, or acts of bankruptcy committed anywhere; and it is a familiar maxim of the law, "Extra territorium jus dicenti non impune paretur."

Once it is admitted that a limit must be placed upon those words, it must follow that the limit must be "debtor" and "creditor" respectively who are subject to the jurisdiction of the English bankruptcy law. And this is not an assuming of the question or a mere inverting of the proposition, because if one sees what jurisdiction is expressly created it will be seen that the limitation to the English bankruptcy jurisdiction is necessarily local. It does not include Great Britain. It is limited in its terms to England; and I think it would be impossible to suppose that if the Legislature had intended so broad a jurisdiction as is contended for here, it would not have conferred it by express enactment.

The whole argument, I think, depended upon the generality of the word "debtor." I will deal hereafter with the question of whether the Bankruptcy Act of 1883 has made any difference in this respect. But the sixth section of the Act of 1869 came under review before Lord Selborne and Sir George Mellish in 1873, and in that judgment I find that those very learned judges were of opinion "that a foreigner domiciled in England, and not carrying on trade in England, who quits England without having committed an act of bankruptcy, cannot be made a bankrupt upon an alleged act of bankruptcy committed out of England." "We think that the Legislature" (the judgment continues) "cannot have intended to enact that if a foreigner who is not subject to the laws of England was something in his own country which may be perfectly lawful and

innocent by the laws of that country, the effect should be that his property should be vested in a trustee in England for the benefit of his creditors." Their Lordships then considered the effect of particular acts which were made acts of bankruptcy when committed out of England. "The first is that a debtor has, in England or elsewhere, made a conveyance or assignment of his property to a trustee for the benefit of his creditors generally. This seems clearly intended to relate to a conveyance which is to operate according to English law, which a conveyance executed by a domiciled Englishman, although out of England, may do; but a conveyance executed by a domiciled foreigner in his own country must necessarily operate according to the foreign law, and we think it was never intended that such a conveyance should be an act of bankruptcy. The second is, that the debtor has in England or elsewhere made a fraudulent conveyance, &c., of his property or any part thereof. This clearly means, and has always been interpreted as meaning, fraudulent by the law of England, and therefore cannot properly apply to a conveyance which is executed in, and is to operate according to the law of, a foreign country": *Ex parte Crispin, In re Crispin.* (1)

My Lords, the whole of the reasoning of the learned judges in that case seems to me so cogent that, if the case was to be decided upon the Act of 1869, I confess I should not have been able to entertain a doubt on the subject. But the facts in *Ex parte Crispin* (1) raised a different question, and it might be said that the opinions, however strongly expressed in that case, were not necessary for its decision, since it turned upon the fact that no act of bankruptcy had been committed in this country.

However, the question in debate came before a Court consisting of James L.J., the late Master of the Rolls (Lord Esher), and Cotton L.J.; and upon principles which, I think, were established by *Ex parte Crispin* (1), they held, in terms, that an act of bankruptcy must be a personal act or default, and it cannot be committed through an agent nor by a firm as such; and that the English statute could only affect English

(1) L. R. 8 Ch. 374, 379.

H. L. (E.) 1900 COOKE v. CHARLES A. VOGELER COMPANY. Earl of Halsbury L.C.

subjects or foreigners who come, either permanently or temporarily, within the allegiance of the English Crown: *Ex parte Blain, In re Sawers.* (1)

I do not think anything can be gained by referring further to *Ex parte Blain.* (1) I entirely agree with the reasoning of all the three learned judges who constituted the Court, and it only remains to consider whether the Act of 1883 has made any difference in the law. That exact question came before the Court of Appeal in 1892, and Lord Esher, Fry L.J. and Lopes L.J. decided, without any doubt, that upon the question now under debate, the Act of 1883 had made no difference.

The whole argument there turned on s. 6, sub-s. (*d*), but the Court pointed out (I think with irresistible force) that s. 4, which enacted what acts were to be acts of bankruptcy, used the word "debtor"; and the same argument, which was decisive on the earlier Act, appears to me to be decisive here. The word is general; some limitation must be placed upon it, and sub-s. (*d*) of s. 6 has no relation to, and cannot give any artificial meaning to the word "debtor" in s. 4. As Lord Esher pointed out, s. 4 states affirmatively what are to be acts of bankruptcy. Sect. 6 is a negative section, and does not in any way affect the construction of s. 4.

Fry L.J. points out that the word "debtor" in sub-s. 1 (*g*) of s. 4 does not mean a debtor all the world over, but that it means only a debtor who is subject to the law of England, and that you must find such a debtor before an act of bankruptcy can be committed. And he goes on to add what in my view is perfectly well founded, that the decision in *Ex parte Blain* (1) was based not on the particular words of the bankruptcy statute then in force, but upon general principles applicable to the construction of all statutes: *In re Pearson, Ex parte Pearson.* (2)

My Lords, it would, I think, be a serious thing to overrule so strong a body of judicial authority dealing with this very question. These decisions have been given many years ago, and in my view it is impossible without express legislation on the subject to lay down any other rule than is deducible from

(1) (1879) 12 Ch. D. 522. (2) [1892] 2 Q. B. 263.

all these various decisions; and in view of the opinion I entertain upon that subject, I move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I have had the advantage of reading in print the opinion which has just been delivered by my noble and learned friend on the woolsack, and also the opinion which will presently be delivered by my noble and learned friend Lord Davey. I agree with them, and I have nothing to add.

LORD DAVEY. My Lords, the respondents are citizens of the United States domiciled and residing in the State of Maryland, but for some years they have carried on business and had an office in this country. The appellant is a creditor of the respondents, and has sued in the Court of Bankruptcy for a receiving order against them. The learned judges in the Court of Appeal have held that the case was covered by authority binding upon them, and confirmed the order of the registrar dismissing the application. I agree with the learned judges in thinking that if *Pearson's Case* (1) is rightly decided, the case is concluded against the appellant.

My Lords, in the view which I take of the law, it is essential to consider whether the alleged act of bankruptcy was committed in this country or abroad. The facts are these: on December 18, 1899, the respondents executed an assignment of all their property to one Dulaney, in trust for their creditors. Dulaney on the following day wrote to Geddes, the manager in this country of the respondents' business, instructing him not to pay the creditors of the respondents whose debts were incurred before December 18, and these instructions were communicated to one or more of the creditors. It was argued that this was a notice by the respondents to their creditors that they had suspended, or were about to suspend, payment of their debts within the meaning of s. 4, sub-s. 1 (*h*), of the Bankruptcy Act, 1883. I am not of that opinion; I think there is no evidence of any direct authority from the respondents to give those instructions, or give any notice to the

(1) (1892) 2 Q. B. 263.

H. L. (E.) 1900 COOKE v. CHARLES A. VOGELER COMPANY. Lord Davey.

effect alleged, and that the instructions given by Dulaney must be taken to have been given by him as assignee of the business and property, and not as agent for the respondents. The only act which can be relied on as an act of bankruptcy is the assignment, which was executed in Baltimore, and was intended to have effect according to the law of Maryland, and not that of this country.

Now, what is the law applicable to this state of facts? My noble and learned friend has referred to the case of *Ex parte Crispin* (1), decided by Lord Selborne and Mellish L.J. in the year 1873 under the Act of 1869. I will not trouble your Lordships by reading again the passages from the judgment of the Court delivered by the Lord Justice, which have already been read. It was there laid down that a foreigner trading in England is subject to the bankruptcy law, but that it is the act of bankruptcy which gives the Court jurisdiction, and that in the case of a foreigner that act of bankruptcy must be committed in this country or be an act intended to operate according to the law of this country.

It was contended that the Lord Justice's observations were not applicable to the case of a foreigner carrying on trade in England. I do not think so. It was not necessary to deal with that case for the purpose of the decision, and the Lord Justice's remarks are not pointed to it. But I think the principle enunciated so clearly and fully in his judgment is equally applicable whether the foreigner be brought within the reach of the bankruptcy law by his residence in this country, or from the fact of his trading here.

In *Ex parte Pascal* (2) it was decided by the Court of Appeal (including Mellish L.J.) affirmatively that a debtor summons may be taken out against a foreigner who is at the time in England although the debt was contracted abroad.

In *Ex parte Blain* (3), decided in 1879, also under the Act of 1869, it was held that the Court of Bankruptcy has no jurisdiction to make an adjudication against a foreigner domiciled and resident abroad who has never been in England, but is a

(1) L. R. 8 Ch. 374. (2) 1 Ch. D. 509.
(3) 12 Ch. D. 522.

member of an English firm which has traded and contracted debts in England. The act of bankruptcy relied on was the levy of an execution by writ of fi. fa. on the goods of the firm. It was held that this was not an act of bankruptcy by the foreign partners of the firm, for that a firm as such cannot commit an act of bankruptcy, and such an act must be the personal act or personal default of the person who is to be made a bankrupt. I have some doubt whether the foreigners might not have been held responsible for the default of their partners in the course of carrying on the business. But, whether that be so or not, my doubt does not affect the case before your Lordships. Brett L.J. repeated what had been decided in *Ex parte Crispin* (1): "It is the act of bankruptcy which gives the Bankruptcy Court jurisdiction, and unless that act be committed in England, if the debtor is a foreigner and not domiciled in England, the English Court has no jurisdiction over him."

Such was the state of the law before the Act of 1883 was passed. It is contended that there is something in that Act which has altered the law as laid down in the cases to which I have referred, and what is chiefly relied on is s. 6. That section provides that a creditor shall not be entitled to present a bankruptcy petition against a debtor unless (inter alia) (*d*) the debtor is domiciled in England, or within a year before the date of the presentation of the petition has ordinarily resided or had a dwelling-house or place of business in England. It was argued that this was equivalent to an enactment that the Court shall have jurisdiction over a foreigner who within a year has had a place of business in England. The first observation that occurs to one on this provision is that it is negative and restrictive. It says what are the conditions in the absence of which the Court cannot exercise its jurisdiction, but does not confer any new or increased jurisdiction. But, further, assuming (as I think is the fact) that the Court has a limited jurisdiction over foreigners residing abroad but trading in this country, there is no provision in the Act which purports to alter or has the effect of altering the law as to the conditions

(1) L. R. 8 Ch. 374.

H. L. (E.) 1900 COOKE v. CHARLES A. VOGELER COMPANY. Lord Davey.

on which or the limits within which that jurisdiction should be exercised. If, therefore (as I also think), one of the conditions and limitations on the exercise of bankruptcy jurisdiction against a foreigner domiciled and resident abroad is that the act relied on as an act of bankruptcy must have been done by the bankrupt within the jurisdiction, or at any rate (which is sufficient for the present purpose) if the execution of an assignment of his property by a foreign debtor in his own country is not an act of bankruptcy within the meaning of the statute—if that be so, I say, the jurisdiction has never arisen.

My Lords, this was the substance of the decision of the Court of Appeal in *Pearson's Case* (1), although the details were different. I think that case was rightly decided on the authorities, and the Court of Appeal was also right in thinking it governed the present case. It is, in my opinion, too late for this House to reverse such a uniform course of decision even if your Lordships were disposed to do so.

I am, therefore, of opinion that the appeal should be dismissed with costs.

LORD JAMES OF HEREFORD. My Lords, I concur in the judgments of my noble and learned friends for the reasons given by them.

LORD BRAMPTON. My Lords, the sole question involved in this case is whether the High Court of Justice in Bankruptcy, in granting, at the instance and on the petition of the appellant, a receiving order against the respondents, acted without jurisdiction.

The respondent company, consisting only of two American subjects named Devries, were traders at Baltimore, U.S., where they resided. Through Mr. Geddes, their manager, they carried on a branch of that business in England, but neither of them had ever been personally present in England, and they were not subjects of Her Majesty the Queen. To this branch establishment the appellant, on the order of Geddes, supplied goods in respect of which the respondents became indebted to

(1) [1892] 2 Q. B. 263.

him to the amount of 4000*l*. In December, 1899, the respondents in Baltimore executed a deed of assignment of all their property to a Mr. Dulaney, their manager there, in trust, to apply the proceeds thereof to the payment of all their debts, and, at the instance of Dulaney, Geddes gave to the appellant a notice of suspension of payment. Both the assignment and notice were treated by the appellant as acts of bankruptcy, and in respect of them it was that the petition for the receiving order was presented and granted. After discussion, however, before the Registrar in Bankruptcy, it was subsequently discharged. The Court of Appeal upheld the decision of the Registrar. The appellant, being dissatisfied, has appealed to your Lordships. The case in the Court of Appeal is reported in the L. R. [1900] 1 Q. B. 541, as *In re A. B. & Co.*

It seems to me that, unless your Lordships are prepared to overrule the three cases chiefly relied upon for the respondents, *Ex parte Crispin* (1), decided by Lord Selborne and Mellish L.J.; *Ex parte Blain, In re Sawers* (2), by James, Brett, and Cotton L.JJ.; and *Ex parte Pearson* (3), by Lord Esher M.R. and Fry and Lopes L.JJ., this case is concluded by them in favour of the respondents. It is quite true that the two first of these cases were decided upon the Bankruptcy Act, 1869, but I do not think the value of them is at all affected by the Bankruptcy Act, 1883. *Ex parte Pearson* (3), decided upon that Act, practically held that it is not.

In dealing with this case, the one fact never to be lost sight of is that neither of the respondents was ever personally in England, and therefore never within the jurisdiction of the High Court of Bankruptcy. It follows that neither was ever in a position to commit within that jurisdiction an act of bankruptcy. It is true that through their agent, Geddes, they traded in England; in the course of that trading became indebted in England, and were possessed of goods which were within the jurisdiction, and they might be sued to judgment, and execution might be levied upon such goods, as was pointed out by James L.J. in *Blain's Case* (2); but to make a foreigner

(1) L. R. 8 Ch. 374. (2) 12 Ch. D. 522, at p. 526.
(3) [1892] 2 Q. B. 263.

H. L. (E.) 1900 COOKE v. CHARLES A. VOGELER COMPANY. Lord Brampton.

subject to the bankruptcy law of England two things are essential, both of which are absent in this case, namely, that the person sought to be made liable to that law should have been in England, and there committed an act of bankruptcy. There is great force and truth in the language of James L.J., that "the whole question is governed by the broad general principle that English legislation, unless the contrary is expressly enacted, or so plainly implied as to make it the duty of an English Court to give effect to an English statute, is applicable only to English subjects, or to foreigners who by coming into this country, whether for a long or a short time, have made themselves during that time subject to English jurisdiction." Later on he added (1): "It is not consistent with ordinary principles of justice or the comity of nations that the legislature of one country should call on the subject of another country to appear before its tribunals when he has never been within their jurisdiction."

One passage in the judgment of Sir G. Mellish in *Crispin's Case* (2) seems peculiarly applicable to the alleged act of bankruptcy by the execution of the assignment of the respondents' goods at Baltimore. He says (3): "We think that the Legislature cannot have intended to enact that if a foreigner who is not subject to the laws of England does something in his own country which may be perfectly lawful and innocent by the laws of that country, the effect should be that his property should be vested in a trustee in England for the benefit of his creditors."

With the law so clearly stated as it was in *Crispin's* (2) and *Blain's Cases* (4), if the Legislature had in the Act of 1883 intended to make any alteration in it as regarded foreigners, I cannot doubt it would have done so in unmistakable language. Its silence in regard to the matter satisfies me that it had no such intention, and that it at least recognised and was content with the law as so laid down.

Before I conclude I desire to say one word about ss. 4 and 6 in the Act of 1883, which, it has been suggested, effect an

(1) 12 Ch. D. at p. 527.
(2) L. R. 8 Ch. 374.
(3) L. R. 8 Ch. at p. 380.
(4) 12 Ch. D. 522.

alteration as regards any debtor having a place of business in England: s. 6 (*d*). Sect. 4 simply enumerates the cases in which "a debtor" commits an act of bankruptcy. Sect. 6 provides that a creditor shall not be entitled to present a bankruptcy petition against "a debtor" unless (*d*) the debtor is domiciled in England, or within a year has ordinarily visited or had a dwelling-house or place of business in England. But this provision has obviously no application unless "a debtor" has first committed an act of bankruptcy. Now Sir George Mellish, in *Crispin's Case* (1), distinctly stated that the word "debtor" in the Bankruptcy Act of 1869 must be construed to mean "debtor" properly subject to the laws of England. If the word "debtor" is to be similarly construed in the Act of 1883 as the Court ruled—and, as I think, rightly—in *Pearson's Case* (2), the respondents never having been in England at all, were never subject to the bankruptcy laws of England. The 4th section had no application to them, and the 6th section is unimportant to the question before this House.

I think the judgment of the Court of Appeal affirming the order of the registrar is right, and that this appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, I have had an opportunity of reading the written judgments of my noble and learned friends, and I entirely agree in what they have said.

Order appealed from affirmed, and appeal dismissed with costs.

Lords' Journals, December 14, 1900.

Solicitors: *Bentwich, Watkin-Williams & Gray; J. Arscott Bartrum.*

(1) L. R. 8 Ch. 374.

(2) [1892] 2 Q. B. 263.

[PRIVY COUNCIL.]

J. C.* 1900 Nov. 22, 27; Dec. 8.

HARDOON . . . . . PLAINTIFF;

AND

BELILIOS . . . . . DEFENDANT.

ON APPEAL FROM THE SUPREME COURT OF HONG KONG.

Calls Paid by Registered Owner of Shares—Liability of Beneficial Owner—Indemnity.

A party who is sui juris and beneficially entitled to shares which he cannot disclaim is personally bound, in the absence of contract to the contrary, to indemnify the registered holder thereof against calls upon them. It is immaterial whether the beneficial owner originally created the trust by which the registered holder was plainly affected, or accepted a transfer of the beneficial ownership with knowledge of the trust.

APPEAL from an order of the Supreme Court (Feb. 28, 1899) affirming an order of the Chief Justice (May 19, 1898) non-suiting the appellant.

The suit was brought under the circumstances stated in the judgment of their Lordships to recover payment of the amount of calls on fifty shares in the Bank of China, Japan, and the Straits, Limited, which the appellant as their registered holder had been compelled to pay, the respondent being the beneficial owner thereof.

At the close of the appellant's case the respondent's counsel asked for a non-suit (1.) on the ground that the appellant had failed on the evidence before the Court to establish his contention that the respondent was the true owner of the shares in question, and (2.) on the ground that, even assuming this was taken as proved, there was no privity of contract between the respondent and the appellant in respect of the shares, and consequently no liability on the part of the respondent to indemnify the appellant against calls or otherwise.

The Chief Justice found that the appellant had established

* *Present:* LORD HOBHOUSE, LORD ROBERTSON, LORD LINDLEY, SIR FRANCIS JEUNE, and SIR FORD NORTH.

his contention that the respondent was and had since June 30, 1893, been the true owner of the shares in question; he nevertheless directed judgment of non-suit in favour of the respondent on the ground that, as a matter of law, the respondent was under no liability, contractual or otherwise, to indemnify the appellant in respect of the shares.

This judgment was affirmed by the Full Court on appeal; the Chief Justice stating more specifically than in his former judgment that he did not think that the appellant had satisfied the onus which lay upon him of establishing that the relationship of trustee and cestui que trust subsisted between him and the respondent.

Latham, Q.C., and *F. Whinney*, for the appellant, contended that the true question in dispute between the parties was not whether or not privity of contract or the relation of vendor and purchaser existed between them, but whether a trust relation had been constituted. It was contended that on the evidence the entire and absolute beneficial interest in the fifty shares in dispute was vested in the respondent, who in consequence had received the dividends and paid earlier calls. From the moment of being registered as holder in the bank's books the appellant had had no beneficial interest, but had been trustee for the true owner—that is, for the respondent and his assignor before him. According to established rules of equity, the trustee's right to be indemnified by his cestui que trust flowed from the trust relation and the fact that he had been compelled to discharge an obligation of the trust estate. Reference was made to *Castellan* v. *Hobson* (1); *Jervis* v. *Wolferstan* (2); *Levi* v. *Ayers* (3); *Fraser* v. *Murdoch* (4); *James* v. *May* (5); *Phené* v. *Gillan* (6); *Brown* v. *Black*. (7)

Joseph Walton, Q.C., and *R. J. Parker*, for the respondent, contended that the Courts below were right. The respondent

(1) (1870) L. R. 10 Eq. 47.
(2) (1874) L. R. 18 Eq. 18.
(3) (1878) 3 App. Cas. 842.
(4) (1881) 6 App. Cas. 855.
(5) (1873) L. R. 6 H. L. 328.
(6) (1845) 5 Hare, 1.
(7) (1873) L. R. 15 Eq. 363; 8 Ch. 939.

J. C. 1900 HARDOON v. BELILIOS.

never expressly or impliedly contracted to indemnify the appellant in respect of the shares in question. There, at all events, was no contractual relation from which any obligation to that effect could be implied. As for the trust relationship, the cases shew that no liability arises from that, but only from an antecedent request expressed or implied and made by the cestui que trust. No one of them shews that the cestui que trust is under all circumstances and always liable to indemnify. Dicta are to be found therein some of which are too broad and must be qualified with reference to the facts. Here the shares were not acquired by the respondent under such circumstances as to impose upon him a liability to indemnify either the persons from whom he acquired them, and who originally created the trust under which the appellant held, or the appellant. Even if the appellant had any right to indemnity as trustee, it was merely a right to be indemnified out of the trust property, and not by the cestui que trust personally. Reference was made to *Grissell* v. *Bristowe* (1); *Loring* v. *Davis* (2); *Sales* v. *Blane* (3); *Fraser* v. *Murdoch* (4); *Jervis* v. *Wolferstan* (5); *Hobbs* v. *Wayet* (6), where a request was relied upon. So in *James* v. *May* (7); *In re National Financial Co.* (8); *Hemming* v. *Maddick.* (9) Similar questions between vendor and purchaser come under the same principle: see *Kellock* v. *Enthoven* (10); *Castellan* v. *Hobson* (11); *Loring* v. *Davis* (2); *Brown* v. *Black.* (12)

Latham, Q.C., replied.

1900 Dec. 8.

The judgment of their Lordships was delivered by

LORD LINDLEY. The question raised by this appeal is whether the plaintiff, who is the registered holder of some shares in a banking company which is being wound up, is entitled to be indemnified by the defendant who is the beneficial

(1) (1868) L. R. 4 C. P. 36.
(2) (1886) 32 Ch. D. 625.
(3) (1849) 14 Q. B. 205.
(4) 6 App. Cas. 855.
(5) L. R. 18 Eq. 18.
(6) (1887) 36 Ch. D. 256.
(7) L. R. 6 H. L. 328.
(8) (1868) L. R. 3 Ch. 791.
(9) (1872) L. R. 7 Ch. 395.
(10) (1873) L. R. 8 Q. B. 458; (1874) 9 Q. B. 247.
(11) L. R. 10 Eq. 47.
(12) L. R. 15 Eq. 363; 8 Ch. 939.

owner of those shares, against calls made upon them in the winding-up of the company. The Courts of Hong Kong have decided against the plaintiff upon the evidence adduced by him, and have entered judgment of non-suit. The defendant adduced no evidence; it did not become necessary for him to do so. The Chief Justice, who first heard the case, decided that the defendant was the sole beneficial owner of the shares, but that the plaintiff had failed to prove any contract by the defendant to indemnify him either express or implied. On appeal the Chief Justice and Wise J. considered that, although the defendant had become the sole beneficial owner of the shares, the relation of trustee and cestui que trust had not been created between the plaintiff and the defendant, and that the defendant had not become liable to indemnify the plaintiff. Against these decisions the plaintiff has appealed to this Board.

The facts of the case so far as they are material are shortly as follows:—

The bank in question was formed and registered with limited liability under the Companies Act, 1862. Its capital was divided into shares which were not fully paid up when it went into liquidation, which it did in December, 1894. Calls have been made on the contributories, of whom the plaintiff is one. He is a contributory in respect of fifty 10*l.* shares. He has been sued by the liquidator for the calls made on him in respect of those shares, and judgment has been given against him for 402*l.* 12*s.* 11*d.*, which he seeks to recover from the defendant.

The fifty shares in question were placed in the plaintiff's name in April, 1891, by his then employers, Benjamin & Kelly, who were share-brokers. The plaintiff never had any beneficial interest in them; but he was registered as their holder on April 3, 1891. A provisional certificate of his ownership was made out, and he signed a blank transfer of them, and those two documents were held by Benjamin & Kelly, who paid the application and allotment money and first call. This certificate and transfer afterwards came into the hands of one Coxon, who acted on behalf of a syndicate formed to speculate in shares in another company. The defendant financed this syndicate, and the provisional certificate and blank transfer of the fifty shares

J. C. 1900 HARDOON v. BELILIOS.

in question were with other securities pledged by Coxon with the defendant as security for his advances. In October, 1891, the plaintiff's provisional certificate was exchanged for an ordinary certificate, which the defendant has ever since held. In March, 1892, dividends were paid on those shares, and the defendant as holder of these fifty shares demanded these dividends from the plaintiff, and received them from him. The operations of the syndicate resulted in considerable loss. Their accounts with the defendant were closed, and in October, 1892, the defendant became the absolute owner of the shares. This at least is the conclusion arrived at by both Courts in Hong Kong from the entries in the defendant's books, and there are no grounds on which this Board can come to any different conclusion.

In November, 1893, a call of 1*l.* per share was made payable by four instalments of 5*s.* each. The first three of these instalments, payable in November, 1893, February and April, 1894, were at the plaintiff's request paid by the defendant to the plaintiff and by him to the bank. The defendant said he was not liable to pay them; and in his books he debited the plaintiff with those payments, but there is no evidence that the plaintiff was informed of this. The fact that the defendant did not at this time debit Coxon with these calls seems to their Lordships very strong evidence that at this time Coxon's interest in these shares was at an end, and they belonged absolutely to the defendant.

On April 10, 1894, the plaintiff wrote to the defendant asking that the shares might be transferred out of the plaintiff's name; but the defendant declined to get this done, and the plaintiff said no more about it until June, 1894, when the fourth instalment of 5*s.* in respect of the call of 1*l.* became due. The plaintiff then asked the defendant to pay this instalment, and he did so, but debited the plaintiff with the amount as before. Shortly afterwards the plaintiff's solicitors wrote to the defendant and asked him to have the shares transferred out of the plaintiff's name. But the defendant declined, saying that the shares were lodged with him by Coxon, who was absent from the Colony.

Further correspondence took place after calls had been made by the liquidator on the plaintiff as already stated; but the defendant refused to indemnify the plaintiff, and this action was commenced.

It appears from the evidence as it stands that the defendant became in October, 1892, the sole beneficial owner of these shares, the legal title to which was vested in the plaintiff. Assuming this to be established, their Lordships are at a loss to understand what more was required to create the relation of trustee and cestui que trust between the plaintiff and the defendant. The facts that they never stood in the relation of vendor and purchaser, that there was no contract between them, that the defendant never requested the plaintiff to become his trustee, are quite immaterial. All that is necessary to establish the relation of trustee and cestui que trust is to prove that the legal title was in the plaintiff and the equitable title in the defendant. This might be proved in many ways. The mode of proof is quite immaterial. Being proved, no matter how, the relation of trustee and cestui que trust was thereby established.

No one can be made the beneficial owner of shares against his will. Any attempt to make him so can be defeated by disclaimer. But the moment the defendant accepted the beneficial ownership of these shares he became the plaintiff's cestui que trust, and the plaintiff had no option in the matter.

The next step is to consider on what principle an absolute beneficial owner of trust property can throw upon his trustee the burdens incidental to its ownership. The plainest principles of justice require that the cestui que trust who gets all the benefit of the property should bear its burden unless he can shew some good reason why his trustee should bear them himself. The obligation is equitable and not legal, and the legal decisions negativing it, unless there is some contract or custom imposing the obligation, are wholly irrelevant and beside the mark. Even where trust property is settled on tenants for life and children, the right of their trustee to be indemnified out of the whole trust estate against any liabilities arising out

J. C. 1900 HARDOON v. BELILIOS.

of any part of it is clear and indisputable; although, if that which was once one large trust estate has been converted by the trustees into several smaller distinct trust estates, the liabilities incidental to one of them cannot be thrown on the beneficial owners of the others. This was decided in *Fraser* v. *Murdoch* (1), which was referred to in argument. But where the only cestui que trust is a person sui juris, the right of the trustee to indemnity by him against liabilities incurred by the trustee by his retention of the trust property has never been limited to the trust property; it extends further, and imposes upon the cestui que trust a personal obligation enforceable in equity to indemnify his trustee. This is no new principle, but is as old as trusts themselves.

In *Balsh* v. *Hyham* (2) the trustee sought indemnity in equity, not against a liability incidental to the ownership of the trust property, but against a liability incurred by him by borrowing money at the request and for the benefit of his cestui que trust. The Court decided that the plaintiff was entitled in equity to the relief which he sought on the broad ground "that a cestui que trust ought to save his trustee harmless as to all damages relating to the trust." This language (although open to criticism if applied to cestuis que trustent who are not sui juris and also sole beneficial owners) shews plainly enough that it was taken for granted as well settled that, speaking generally, absolute beneficial owners of property must in equity bear the burdens incidental to its ownership and not throw such burdens on their trustees.

The short report of *Balsh* v. *Hyham* (3) shews that this general rule was well recognised, and that the decision was only an illustration of its application to the facts then before the Court.

It is impossible to read the judgment of Vice-Chancellor Wigram in *Phené* v. *Gillan* (4) without coming to the conclusion that he also regarded the general rule as well established.

The principle acted upon in *Balsh* v. *Hyham* (2) was reconsidered and most strikingly illustrated in the well-known

(1) 6 App. Cas. 855.
(2) (1728) 2 P. Wms. 453.
(3) 2 Eq. Ca. Ab. 741, fol. 8.
(4) 5 Hare, 1.

case of the *German Mining Co., Ex parte Chippendale* (1), where the shareholders of a mining company were held liable personally to indemnify the directors against payments made by them in discharge of debts contracted by them, but which payments created no legal obligation on the company enforceable at law, and could not be recovered by the directors from the company by any action at common law. The shareholders in vain contended in that case that the directors had only a right to indemnity out of the assets of the company. (2)

Where, as in *Balsh* v. *Hyham* (3), a trustee seeks indemnity in respect of transactions in which he need not have engaged and which were not within the scope of his trust, he must prove that his cestui que trust either authorized or ratified such transactions. But if he has incurred liability within the scope of his trust, and for the benefit of his cestui que trust, *Ex parte Chippendale* (1) shews that nothing more is required.

When a trustee seeks indemnity from his cestui que trust against liabilities arising from the mere fact of ownership, there is neither principle nor authority for saying that the trustee need prove any request from his cestui que trust to incur such liability. In the case supposed the trust involves such liabilities, and the trustee, whilst he remains such, cannot get rid of them. He is subject to them as legal owner; but in equity they fall on the equitable owner unless there are good reasons why they should not.

As regards shares, this right of a trustee to be indemnified by his cestui que trust against calls has been repeatedly recognised and enforced on the principles applicable to the equitable ownership of property, and without reference to the principles applicable to contracts, or specific performance, or any other legal or equitable doctrine. Nothing can be plainer or sounder than the language of James V.-C. in *Castellan* v. *Hobson* (4), and of Chitty J. in *Loring* v. *Davis*. (5) *James* v. *May* (6) proceeded on the same principle. Other cases to the same effect might be cited, but it is unnecessary to refer to them.

(1) (1853) 4 D. M. & G. 19.
(2) Page 54.
(3) 2 P. Wms. 453.
(4) L. R. 10 Eq. 47.
(5) 32 Ch. D. 634.
(6) L. R. 6 H. L. 328.

J. C. 1900 HARDOON v. BELILIOS.

No case has been found, nor as their Lordships believe can be found, which is opposed to these authorities.

The principle was recognised by Fry J. in *Hughes-Hallett* v. *Indian Mammoth Gold Mines Co.* (1), although he there held that the application for indemnity was premature.

It is true that the facts of this case are not in all respects like those in the cases above alluded to. But although the facts are different the result of them is the same—i.e., the facts were such that the relation of trustee and cestui que trust was created. In this case the defendant did not create the trust on which the plaintiff originally held the shares. The defendant had nothing to do with procuring their registration in the plaintiff's name as trustee for Benjamin and Kelly and their assigns. This feature of the case was strongly relied upon by the defendant's counsel as distinguishing it from those above mentioned, and reliance was placed on what Lord Blackburn said in *Fraser* v. *Murdoch* (2) about makers of trusts (3) and trusts to carry on business with particular funds. (4) But their Lordships can find nothing in Lord Blackburn's judgment which is inconsistent with the principles which in their Lordships' opinion govern this case. The fact that the defendant did not create the trust on which the plaintiff held the shares when they were first placed in his name affords the defendant no defence to this action. Although the defendant did not create the trust, he accepted a transfer of the beneficial ownership in the shares, first as mortgagee and afterwards as sole beneficial owner, with full knowledge of the fact that they were registered in the plaintiff's name as trustee for their original purchasers and their assigns, whoever they might be. By this acceptance the defendant became the plaintiff's cestui que trust; and the plaintiff could not prevent it or effectually dispute his trusteeship for the defendant. By this acceptance the defendant created the trust for himself. Having done so, the defendant as the beneficial owner of the shares demanded from the plaintiff and obtained dividends declared in respect of them. The defendant also paid calls

(1) (1882) 22 Ch. D. 561.
(2) 6 App. Cas. 855.
(3) 6 App. Cas. 872.
(4) 6 App. Cas. 875.

made upon them, although he attempted to protect himself from any admission of liability by entering these payments in his books as made on behalf of the plaintiff. Lastly, when asked by the plaintiff to procure a transfer of the shares out of the plaintiff's name, the defendant refused to do so, and thereby compelled the plaintiff to continue to hold them as his trustee. It is idle after this to rely on the fact that the defendant did not create the trust in the first instance, and idle to talk of renunciation or disclaimer of these shares by the defendant. He cannot now get rid of the trust for himself which he created by becoming beneficial owner of the shares, and which trust he has recognised since as subsisting.

It is quite unnecessary to consider in this case the difficulties which would arise if these shares were held by the plaintiff on trust for tenants for life, or for infants, or upon special trusts limiting the right to indemnity. In those cases there is no beneficiary who can be justly expected or required personally to indemnify the trustee against the whole of the burdens incident to his legal ownership; and the trustee accepts the trust knowing that under such circumstances and in the absence of special contract his right to indemnity cannot extend beyond the trust estate, i.e., beyond the respective interests of his cestuis que trustent. In this case their Lordships have only to deal with a person sui juris beneficially entitled to shares which he cannot disclaim. The obligation of such a person to indemnify his trustee against calls upon them appears to their Lordships indisputable in a court of equity unless, of course, there is some contract or other circumstance which excludes such obligation. Here there is none. Whether the plaintiff in this case could sue Benjamin and Kelly on any promise by them to indemnify him need not be discussed. Such a right if it exists in no way affects the obligation of the defendant as the plaintiff's cestui que trust. But it is obvious that any payment to the plaintiff by Benjamin and Kelly or by the defendant in respect of the calls would reduce the amount which the plaintiff could recover from the defendant or from them as the case might be.

For these reasons their Lordships will advise Her Majesty

J. C. 1900 HARDOON v. BELILIOS.

to allow the appeal, and to reverse the judgments appealed from with costs; and the defendant will pay the costs of this appeal.

Owing to the judgment appealed from being a judgment of non-suit only, their Lordships are unable to advise Her Majesty to order judgment to be entered for the plaintiff with costs. The defendant is entitled to a new trial at the risk of costs. But how in the face of his own books and conduct he can reasonably hope for ultimate success their Lordships are at a loss to conceive. If, however, he insists on his strict rights, he is entitled to have the action remitted to Hong Kong for retrial; and their Lordships will humbly so advise Her Majesty.

Solicitors for appellant: *Harwood & Stephenson.*

Solicitors for respondent: *Sharpe, Parker, Pritchards, Barham & Lawford.*

[PRIVY COUNCIL.]

J. C.* 1900 *July* 21, 28.

Ex parte GREGORY.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Special Leave to Appeal—Victoria Lunacy Act, 1890—*Construction.*

Neither under the Victoria Lunacy Act of 1890 nor under a habeas corpus is a person lawfully detained as a lunatic entitled as of right to have the question of his lunacy decided by means of a jury.

Special leave to appeal from certain orders of Court refused, the petitioner's object being to obtain a jury's decision as to his lunacy.

THIS was a petition for special leave to appeal from orders of the Full Court (Aug. 28, 1899, and Dec. 11, 1899) and, if necessary, from an order of Hodges J. refusing to order the petitioner's discharge, and from an order of the Supreme Court refusing to issue a writ of habeas corpus.

The question decided was whether the Court below was

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

bound to try the issue as to lunacy by means of a jury, which turned mainly on the construction of the Lunacy Act of 1890.

J. C.
1900
GREGORY, *Ex parte.*

Sargant, for the petitioner.

The judgment of their Lordships was delivered by

1900
July 28.

LORD LINDLEY. This is an application, by a gentleman who is detained in the Colony of Victoria as a lunatic, for special leave to appeal against certain orders, his object being to compel the authorities there to try the question of his lunacy by means of a jury.

Their Lordships have looked with care through the Lunacy Act applicable to this case—the Lunacy Act of 1890—and they have come to the following conclusion upon it. If a person is detained as a lunatic he can only be discharged, first, by habeas corpus—which this gentleman has applied for—and, secondly, under the sections of the Lunacy Act relating to discharge, and those are ss. 22 to 27 and 98 to 105. Under none of those sections is there any right to a jury, but great care is taken to ensure the discovery and discharge of any one who ought not to be detained. In addition to those sections, ss. 71, 82, 83, and 85 may be referred to as important. Under a habeas corpus the applicant is not entitled to have his sanity ascertained by a jury. The Court may come to a conclusion, as it has done in this case, that the applicant is lawfully detained upon the evidence before it. The Court is not bound to direct an issue to be tried by a jury. The Court can always direct such an issue if the Court is of opinion that justice requires it.

Under these circumstances their Lordships will not advise Her Majesty to grant the leave asked for in this case.

Solicitors for petitioner: *St. Barbe Sladen & Wing.*

[PRIVY COUNCIL.]

J. C.* 1900 *May* 25; *July* 3.

GALLIERS AND OTHERS . . . . . APPELLANTS;

AND

RYCROFT AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF NATAL.

Roman-Dutch Law—Direct Substitution in Favour of Children who survive the Testator's Widow—Heirs of Predeceased Children excluded—Fidei-commissary Substitution.

Where by will executed in Natal the testator directed that after his wife's death his estate should "be equally divided among my children or such as may be then alive":—

Held, that the children who survived the wife took by direct substitution to the exclusion of the issue of any child who predeceased her. There is no rule of construction in Roman-Dutch law which authorizes children to be read as including grandchildren.

Where a substitution is direct there is no implied condition, under Roman-Dutch law, in favour of the institute, si sine liberis decesserit. But where the substitution is fidei-commissary, such a condition may be annexed to the fidei-commissum, so that unless the condition happens the fidei-commissum does not arise and the substitution fails of effect.

APPEAL from an order of the Supreme Court (Dec. 1, 1898).

The question decided was whether the appellants were entitled under the clause of the will set out in their Lordships' judgment to divide between them the whole of the testator's estate. Their claim was that they alone of the testator's children survived his widow. The respondents claimed a share as representing a son who predeceased her.

Upon this point of construction the majority of the Court below held as follows: "Our law (differing in this respect from English law, but following Roman law) applies to cases of the present kind another rule, namely, that where a parent has appointed children (or remoter descendants) as heirs, and directed that upon their death their share should go over, either to a stranger or to another child, then the going over or

* *Present:* LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, SIR HENRY DE VILLIERS, and SIR FORD NORTH.

substitution is subject to the tacit condition implied by law, that the deceased child left no issue, so that if issue were left that issue would take its parent's share, to the exclusion of those whom the will professedly called to the inheritance, unless, of course, the will was clearly intended to disinherit such issue. This principle is usually enunciated in the form of the following case:—If a testator appoints his son and a grandson by a deceased son as his heirs, and directs that the share of the grandson if he die before thirty shall pass to the son, then if the grandson have children his share will go to them and not to the son, even although the grandson die before thirty." They added: "There is the amplest authority for considering the principle enunciated in the foregoing case as established Roman-Dutch law: Dig. 35. 1. 102; Code, 6. 25. 6 and 6. 42. 30; Voet, 36. 1. 17–19, 23, 24; 2 Burge, p. 109; Van der Linden, Verzameling van Gewijsden cas. 16; Brunnemannus ad Dig. 35. 1. 102 and ad Cod., 6. 25–6 and 6. 42. 30; Strykius, Vol. II. Disp. 25, cap. IV. sec. 69–70; Wissenbach ad Cod. 6. 25. 6, p. 474 and 6. 42. 30; Perezius ad Cod. 6. 25. sec. 12 and 6. 42, sec. 13, 18–20; Sande Decis. Frisic. 4. 6. 6; Christin, Vol. IV. Decis. 45, sec. 2.

"The case before the Privy Council of *Martin* v. *Lee* (1), dealing with French law, referred to the issue of children known by the testator to be dead at the time of the will. It is in accordance with Voet, though many of the Roman-Dutch commentators contest his opinion.

"In the case of *Milne* (2) the late Sir Henry Connor decided that the principle referred to in Dig. 35. 1. 102, and Code 6. 25. 6. and 6. 42. 30 as to grandchildren being tacitly included in a bequest to their parents, is law amongst us; there the will provided that in the event of any one or more of the heirs (who were the testator's grandchildren) dying, his or her share should revert to the survivors; it was laid down not only that the children of any heir dying would take their parent's share, but the Court declined to make any order on the application of all the heirs for the payment to them of the corpus of the

(1) (1860) 14 Moo. P. C. 142.
(2) (1880) 1 Natal Law Rep. 88; (1882) 3 N. L. R. Jan. p. 56.

J. C. 1900 GALLIERS v. RYCROFT.

estate because of a doubt whether children of any heir who might afterwards die might not have a vested interest. We do not wish to be considered as going so far as that, but it appears to us that we should entirely overrule Milne's case, and the almost innumerable authorities based upon Justinian's legislation, if we were to exclude William Elton Galliers from taking his father's share in this estate."

The Chief Justice (Sir M. H. Gallwey) dissented. He said that, "In my opinion there was a gift to the children upon their mother's death, but the subsequent words restricted the gift or the division of the property among such of his children as may be alive. The three daughters alive at the mother's death are entitled under the will to the whole of the father's estate. The son, having died in his mother's lifetime, took no share in the divided property, and his will does not convey any of his father's property disposed of by his father's will." The case is reported in 19 Natal L. R. 221.

J. W. Leonard, for the appellants, contended that the judgment of the Chief Justice was right, and that the order of the majority of the judges should be reversed. That order was based upon the principle that there was a presumption in favour of the testator intending the heirs of the predeceased children to take, which could not be displaced except by clear words in the will shewing an intention to disinherit them. In other words, that there was a tacit condition that the substitution directed only took effect if the predeceased child died without issue. But see Voet, 36. 1. 17, 18, which shews that the principle does not apply in the case of direct substitutions, and that whatever presumption there may be in favour of a testator's intention is easily displaced by any words which fail to confirm it by expressing some different intention. The Supreme Courts in South Africa have always dealt with this point as a question of inference to be collected from all the circumstances of the case, and, above all, from the words which the testator has used: see *Pretorius* v. *Executors of Pretorius* (1); *Michau* v. *Michau's Executor* (2); *Board* v.

(1) (1883) 2 Juta, 293. (2) (1894) 11 Cape S. C. 362.

Titterton (1); *In re Milne.* (2) Children cannot be construed as including grandchildren according to Roman-Dutch law: see *Martin* v. *Lee.* (3) Reference was also made to *Sturgess* v. *Pearson.* (4) See also Williams on Executors, ed. 1879, p. 1102, where the English cases on this subject are collected.

Israel Davis, for the respondents, contended that the order of the Court was right for the reasons stated by the majority of the judges. There is no indication in this will of any intention to disinherit the issue of any of the children who predeceased the testator's widow. There is a strong presumption against any such intention, or any intention to disinherit grandchildren, which must be overcome by plain words not to be found in this will. Even in England "children" can include remoter descendants, as in *Bower* v. *Lewis.* (5)

It is a rule of construction in Roman-Dutch law that a testator comprehends all his direct descendants under the word "children." It only extends in general to direct descendants, not including those of collaterals. It is founded, like the English rule in favour of early vesting (see *Emperor* v. *Rolfe* (6) and *Perfect* v. *Lord Curzon* (7), on a desire to avoid the testator's intention being defeated by the brevity of his language. For authorities, see Van Leeuwen, Censura Forensis, lib. 3, c. 5, ss. 8 and 10; Van Leeuwen, Commentaries, lib. 3, c. 8, s. 12 (Kotze, i. 383); Voet, 36. 1. 22; Sande on Restraints, iii. 2, 5 (Webber, 179). *Spengler* v. *Executors of Higgs* (8) was founded on a misapprehension of the earlier decisions, and may also depend on legislation inapplicable to Natal. *Martin* v. *Lee* (3) was decided on the particular words used. The two Dutch cases mentioned in *Spengler* v. *Executors of Higgs* (8) are better reported in Lybrecht (9), who shews that they applied to children of collaterals only, and that the rule in favour of

(1) (1896) 13 Cape S. C. 164.
(2) 1 Natal Law Rep. 88; 3 Natal Law Rep. 56.
(3) 14 Moo. P. C. 142.
(4) (1819) 4 Madd. 411; 20 R. R. 316.
(5) (1884) 9 App. Cas. 890.
(6) (1728) 1 Ves. Sen. 208.
(7) (1820) 5 Madd. 442; 21 R. R. 331.
(8) (1864) 1 Roscoe, 221 (Cape of Good Hope).
(9) Lybrecht, Redenerend Vertoog over 't Notaris Ampt. 5th ed.: Amsterdam (1768) vol. i. p. 305.

J. C. 1900 GALLIERS v. RYCROFT.

direct descendants was recognised. Reference was made to the other Cape cases cited by the appellant, and it was contended that they merely established that "children" did not in all cases include all descendants.

Leonard replied.

1900 *July* 3.

The judgment of their Lordships was delivered by

SIR HENRY DE VILLIERS. The will which their Lordships are called upon to construe was executed in Natal, but the testator, William Galliers, sen., was an Englishman who had married in England before he settled in Natal. The will is in the English language, and is in the following terms: "I give and bequeath all and singular my real and personal estate .... unto my dear wife Matilda Galliers (born Sabin) for the use and benefit of herself and my children during her lifetime, and after her decease I direct that the same may be equally divided among my children or such of them as may be then alive." The testator died in 1864, leaving him surviving his wife, one son, and three daughters. The son, William Galliers, jun., died in 1875, after executing a will by which he bequeathed all his property to his wife, Fanny Galliers. He left him surviving his wife and one son, William Elton Galliers. The wife of the testator (William Galliers, sen.) died in 1897, leaving her surviving her three daughters already mentioned and her grandson, William Elton Galliers. The executors of William Galliers, sen., thereafter awarded the whole of his estate to the three daughters. Objections were filed against the distribution on behalf of the widow and the son of William Galliers, jun., they claiming to be entitled to share in the distribution of the estate. The Supreme Court by its order (the Chief Justice dissenting) directed the executor "to frame and file an amended account so as to include in it William Elton Galliers, jun., as taking his father's share in the capital of the estate of William Galliers, sen., and also his father's share of the income of that estate from the date of the death of the widow of William Galliers, sen." Against this judgment the three daughters have appealed. The widow of William Galliers, jun., has joined her son in supporting the judgment, but she claims

that, if her son should be held not to be entitled to his father's share, she, as the sole heiress under her husband's will, is entitled to it.

The ground upon which a majority of the Natal Supreme Court supported the claim of the testator's grandson was "that the law of Natal (differing in this respect from English law but following Roman law) applies to cases of the present kind a rule of construction that where a parent has appointed children (or remoter descendants) as heirs, and directed that upon their death their share should go over either to a stranger or to another child, then the going over or substitution is subject to the tacit condition implied by law that the deceased child left no issue." This statement of the rule, if confined to the case of fidei-commissary substitutions, appears to their Lordships to be a fair deduction from the Roman and Dutch authorities on the subject. The rule had its origin in a response given by Papinian and quoted in the Digest, 35. 1. 102, as follows: "A grandfather having instituted as his heirs a son and a grandson born of another son requested the grandson, if he should die within his thirtieth year, to restore the inheritance to his uncle. The grandson died within the age mentioned leaving children. From a conjecture of dutiful conduct I answered that the condition of the fidei-commissum had failed, because it would be found that less had been written than spoken." (1) It is obvious that in this brief opinion Papinian was not referring to the case of a direct or ordinary substitution—that is to say, the substitution of the son on failure of the grandson to take under the will, but to the case of a fidei-commissary substitution—that is to say, the substitution of the son for the grandson, by virtue of a trust imposed on the latter to restore the inheritance on the happening of a certain event after he had entered on it. The term fidei-commissum used by Papinian would not be applicable to a direct substitution, nor

(1) [This is in accordance with the reading of the Florentine MS. "quod minus scriptum quam *dictum* fuerat." But Mommsen's ed. notes *actum* as a certain correction, making the sense in English "that the writing did not fully express the intention." *Coniectura pietatis* is hardly "conjecture" in our sense. One might render it "On general principles of natural affection" as contrasted with the actual words of the testator.—F. P.]

J. C. 1900 GALLIERS v. RYCROFT.

would the grandson be requested or able to restore (restituere) an inheritance which he had never entered upon. The law relating to fidei-commissa had been fully developed in his time, and it was a very common practice for Roman testators, in creating such trusts, to make them conditional upon the fiduciary heir dying without children. Papinian held, in effect, that this condition si sine liberis decesserit should be read into every will whereby the burthen of fidei-commissum is imposed on a grandchild of the testator. The authority of Papinian stood so high that the response was accepted as law, and it was confirmed by two Imperial rescripts quoted in the Code, 6. 25. 6 and 6. 42. 30, which extended the application of the rule to the case in which descendants of whatever degree are burthened with fidei-commissum, and even to the case of natural children who are so burthened. The terms of both rescripts clearly shew that the condition si sine liberis was intended to be read only into wills by which fidei-commissa were created. None of the Dutch commentators on the Digest or the Code who were cited in the judgment of the Court below has extended the rule any further. Voet (36. 1. 17 et seq.), Perezius, Wissenbach, and Strykius treat the matter as part of the law relating to fidei-commissary dispositions, and all the illustrations given by them are cases of fidei-commissary substitution. Brunnemann, in his Commentary on the cited passage of the Digest, confines the rule to fidei-commissary substitutions, and, in his Commentary on the Code, 6. 42. 30, he expressly states, on the authority of Peregrinus (de fidei-commissis) and other writers, that the condition is not implied in the case of ordinary substitution unless the instituted heir is also burthened with a fidei-commissum in favour of the substituted heir. Burge, in his Commentaries, vol. ii. p. 109, says: "The condition si sine liberis is in certain cases implied when it has not been expressed. If a father or grandfather institute his son or grandson, who at the time has no children, with a fidei-commissum to restore the inheritance to a third person, this condition si sine liberis is implied." He then proceeds, following Voet, to specify the limitations upon the rule of construction thus broadly stated, and he treats the matter as falling entirely under the law

relating to fidei-commissary substitutions. No decision of any Court administering the Roman-Dutch law has been cited to shew that the condition has ever been implied in the case of a will under which the heir or legatee, if he took his inheritance or bequest at all, would take it free from any trust or burthen. The case of *Mylne* (1), which was mainly relied upon by the Court below, was treated by the Court which decided it as one of fidei-commissary substitution. The testator in that case bequeathed the annual proceeds of his estate to the children of his daughter Jessie, who had been first married to one Robertson and then to one Tollner. The will then proceeded thus: "In the event of any one of these my heirs dying, whether of the Robertson or Tollner families, the dividend or share of the deceased shall revert to and be paid to the survivors of that family to which the deceased belonged." After the death of the testator the children of Jessie received the annual proceeds, and two of them claimed payment of the corpus of the estate free from any limitation over; but Connor C.J. decided that they were not entitled to succeed, on the distinct ground that the substitution was intended to apply after as well as before they had entered on their inheritance. So far as the substitution was intended to take effect after the testator's death it was clearly fidei-commissary, for the children of Jessie were mentioned as *heirs* whose shares on their death should *revert* to the survivors of their respective families. That being so, the condition si sine liberis was read into the will; but, as it could not be known until the applicants' death whether they would die without issue, the Court refused to order the payment to them of the corpus of their shares as their absolute property. The case, therefore, is no authority for the proposition that the condition si sine liberis can legally be read into a will which merely substitutes one heir or legatee for another in the event of the instituted heir or legatee not entering on the inheritance or legacy.

By the will now in question the testator, after giving a life interest in his estate to his wife for the benefit of herself and his children, directs that after her decease the estate shall be

(1) 1 Natal Law Rep. 88.

J. C. 1900 GALLIERS v. RYCROFT.

equally divided among his children, or such of them as might then be alive. The effect of this direction was virtually to institute the children as heirs on the death of their mother, and to substitute the survivors for such of the children as might die before their mother. It is a case, therefore, of direct and not of fidei-commissary substitution. The children are not requested to part with their inheritance after they have once entered on it, and, consequently, those who survived their mother took their inheritance free from any burthen. Those who died before their mother entered upon no inheritance, and possessed nothing to restore. Their Lordships' attention has, however, been called to the English case of *Sturgess* v. *Pearson* (1), in which it was held that a bequest to several or to a class, "or" to such of them as shall be living at a given period, should be construed as a vested gift to all, subject to be divested in favour of those living at that period, and that, consequently, if none are then living, all are held to take. Their Lordships are not aware that this doctrine of vesting and divesting has ever been adopted in the Roman or Dutch law, but, assuming that it has been so adopted, such a vesting and divesting would be a very different matter from the aditio and restitutio by an heir or legatee under a fidei-commissary substitution. If William Galliers, jun., had survived his mother, his inheritance would, under the will, have belonged to him absolutely. Having died before her, he acquired nothing in respect of which a fidei-commissum could be imposed on him. The will itself is free from ambiguity, and contains no indication of any desire on the testator's part to benefit his grandchildren in preference to his surviving children, and the question to be determined is whether this is a case in which a Court administering the Dutch law could legally supply the omission of a supposed natural duty. To read into a will words which the testator has not used, to presume an intention which the testator has not expressed, can only be justified by a positive rule of construction having the force of law. Such a rule cannot now be extended beyond the special circumstances to which the law originally confined it, even although the reason which led to

(1) 4 Madd. 411; 20 R. R. 316.

the introduction of the rule may be applicable to other circumstances also. It is said that the principle underlying the rule of construction now under consideration is that the testator must be presumed to have overlooked the contingency of his instituted children or other descendants having issue. This principle would, no doubt, also be applicable to the case of direct substitution, but it would be equally applicable to many other cases than that of substitution, whether direct or indirect. The text of the Roman law has applied the rule of construction only to fidei-commissa, no text-writer or decided case under the Dutch law has extended it any further, and those commentators who discuss the question whether the rule should be extended to wills which contain no fidei-commissary substitution answer the question in the negative. Their Lordships are, therefore, unable to agree with the majority in the Court below that the rule should be applied to the construction of the will now in question. It is not implied in this decision that the application of the conditio si sine liberis to direct legacies to children with a substitution has been an illegitimate extension of the principle by those Courts of law (as in Scotland) which have derived it from the Roman law, and their Lordships recognise the strength of the reasoning by which that extension is justified. It is enough for the decision of the present case to say that the Roman-Dutch law has not so proceeded, and it is for their Lordships to apply the law as it stands.

But another rule of construction, bearing a close resemblance to the one just considered, has been called in aid by the respondents, and it is this—that where a testator confers benefits by will on his "children," he must be presumed to have intended to include under that term all other descendants. The reason for this supposed rule is variously stated, and one of the grounds on which it is supported is the extreme improbability that the testator would have omitted to mention other descendants if he had thought of them. It is clear, however, from the reasoning of Voet, 36. 1. 22, that in his time, at all events, no such hard and fast rule of construction was recognised. The conclusion at which he arrived is that the word

J. C. 1900 GALLIERS v. RYCROFT.

"kinderen," which is the Dutch equivalent for "liberi" and for "children," must primâ facie be taken to refer to descendants of the first degree, but that, if it can be gathered from the context of the will, or from other circumstances, that the testator had regard to descendants of a remoter degree, the word should be construed as having such wider signification. He adds that the question in each case is not one of law, but rather of intention. It appears from later authorities that in the case of a bequest to the testator's own "children," the Courts of Holland required much slighter evidence of a desire to benefit further descendants than in the case of a bequest to the children of another person.

It is difficult to find in the terms of the short will now under consideration such an indication of a desire to benefit the children of the testator's children as to justify their Lordships in giving to the term "children" the wider signification contended for. The judges in the Court below held the same view, and moreover relied upon the case of *Martin* v. *Lee* (1), which was decided by their Lordships' Board on appeal from Lower Canada. There the testatrix, a married woman, domiciled in Lower Canada, had made a will in the English language. By the will she devised her estate to her husband for his life, and after his decease to her children living at the time of her decease. One of her children predeceased her, leaving a child who was held by the Court of Lower Canada to be entitled to take under the will on the ground that the term "children" included grandchildren. Their Lordships, however, held that, upon the true construction of the will, the intention of the testatrix was to restrict the gift to her children, which intention countervailed the general force given by the law of Lower Canada to the word "enfants." Their Lordships added that it might well be that the will "having been written in the English language, the proper mode of dealing with the case may have been for the Courts in Canada to ascertain what, according to the English law, was the meaning of the word 'children' as used in the will." The point was not decided, nor is it necessary for their Lordships now to decide it, seeing

(1) 14 Moo. P. C. 142.

that, in their opinion, the children of the testator's children would not have been included in the word "kinderen" even if the will had been in the Dutch language and that word had been employed.

In regard to the respondent Mrs. Rycroft, she claims to be entitled, as sole testamentary heiress of William Galliers, jun., to his share of the estate in case his son should fail in his claim. Their Lordships, however, fully agree with the judges of the Natal Court that the words in the will, "or such of them as may then be alive," prevent such a vesting of the inheritance in any child dying before his or her mother as would make the inheritance transmissible to his or her heirs. It is only in the event of William Galliers, jun., dying after his mother that Mrs. Rycroft would have been entitled to his share of the inheritance. As he died before his mother, his sisters, being the persons substituted for him under their father's will, are entitled to the share which he would otherwise have taken.

The result is that, in their Lordships' opinion, the judgment proposed by the learned Chief Justice was right, and they will humbly advise Her Majesty to allow the appeal, to disallow the objections to the distribution, and to order that the costs of all parties in the Court below be paid out of the estate of William Galliers, sen. The costs of all parties on appeal will also be paid out of the estate.

Solicitors for appellants: *Budd, Johnsons & Jecks.*
Solicitors for respondents: *Atkinson & Dresser.*

[PRIVY COUNCIL.]

J. C.* 1900 Nov. 9, 13; Dec. 8.

THE AUSTRALIAN GOLD RECOVERY COMPANY, LIMITED . . . . . } PLAINTIFFS;

AND

LAKE VIEW CONSOLS, LIMITED . DEFENDANTS.

AND CROSS APPEAL.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

West Australian Patent Act, 1888, *ss.* 49, 23—*Letters of Registration—Invalidity—Prior Publication or User—Amendment of Specification—Renewal Fees.*

Under the provisions of s. 49 of the West Australian Patent Act, 1888, holders of patents obtained in Great Britain or any other country are enabled to obtain letters of registration in the Colony without the formalities and delay necessary on an application for a patent, but subject to all the incidents and conditions to which letters patent would be subject:—

Held, accordingly, that prior publication, or even prior user of an invention in the Colony after the date of its patent, affects the letters of registration.

The provisions of s. 23, as to "amendment of specification," are made applicable by s. 49 to letters of registration.

Where leave to amend a specification has been neither asked for nor granted, but the registrar has simply recorded an amendment without any jurisdiction to do so, it is invalid.

Renewal fees charged by the 2nd schedule of the Act on letters patent are not payable in respect of the letters of registration.]

CROSS APPEALS from an interlocutory judgment of the Full Court (Sept. 19, 1899) given upon a special case in an action for infringement of certain letters of registration granted in Western Australia of a British patent.

On April 17, 1889, the British letters patent, No. 14,174 of 1887, were registered in Western Australia, and letters of registration, No. 189, were granted therefor under the Patent Act, 1888 (52 Vict. No. 5). These letters of registration, No. 189, became vested in the appellants.

On August 20, 1895, the specification of the British patent,

* *Present*: LORD HOBHOUSE, LORD DAVEY, and LORD ROBERTSON.

No. 14,174 of 1887, was duly amended in the United Kingdom, and the appellants alleged that on December 21, 1895, the specification which had been lodged in the Western Australian Patent Office on the application for letters of registration, No. 189, was also duly amended in Western Australia.

To the action for infringement the defences were that the letters of registration No. 189 had not been validly amended in certain necessary particulars, had lapsed, and were invalid because of prior publication, as set out in certain particulars of objection.

The special case raised eight questions, of which the 4th, 5th, and 6th are as follows :—

(4.) Whether common knowledge, prior user, and prior publication outside the Colony of Western Australia (in the case of letters of registration granted in the Colony)—

(*a*) prior to the date of the British letters patent, No. 14,174 of 1887, on which the said letters of registration, No. 189, were granted ;

or,

(*b*) at any time subsequent to such date but prior to the date of such letters of registration, can be relied upon by the defendant company as a defence to this action.

(5.) Whether grounds of objection applicable to the letters patent, No. 14,174 of 1887, can be availed of as a defence to this action.

(6.) Whether any common knowledge, prior user, or prior publication in Western Australia subsequent to the date of the letters patent, No. 14,174 of 1887, can affect the letters of registration, No. 189.

The 4th question was answered by the Court below in the negative, while the two latter questions were answered in the affirmative, on the following grounds. They held that as soon as the English patent becomes locally registered the local letters of registration can be impugned as though they had been letters patent. They considered that although s. 49 of the Act of 1888 says that the letters of registration "shall inure to the benefit of the holder during the continuance of the original patent in the country where it is issued and no

J. C. 1900

AUSTRALIAN GOLD RECOVERY COMPANY v. LAKE VIEW CONSOLS.

longer," those words were not intended to prevent the defendant in an action for infringement from proving that the original patentee was not the true and first inventor in the country where the patent was first issued, nor from setting up any other defence applicable to the original patent.

Fletcher Moulton, Q.C., *Bousfield, Q.C.*, *J. W. Gordon*, and *Walter*, for the appellants, contended that letters of registration duly granted under the Patent Act, 1888, are not impeachable except for some cause appearing on the face of such letters, or for failure of some condition expressed therein. Any question touching the validity of a British patent ought to be heard and determined in the Supreme Court in England, and not elsewhere. That Court alone has jurisdiction to determine it; while the Colonial Court has neither the jurisdiction nor the facilities for conducting the necessary inquiries. Neither the Patent Act, 1888, nor any other Colonial law supplies this inherent defect in the Court. The mere absence of words in the Act of 1888 preventing a defendant from setting up a defence applicable to the original patent does not operate to supply that defect. On the other hand, to grant or withhold letters of registration is absolutely at the discretion of the Colonial Governor, subject to his being satisfied as to certain matters of fact under s. 49. The right given to the holder of a British patent to apply for letters of registration in respect thereof cannot be taken away by any publication of the invention after the letters patent have been granted. In this case the Governor was satisfied under s. 49, and the respondent cannot attack the validity of his grant except for breach of condition or other cause appearing on the face thereof. The grant of the British letters patent was conclusive as to the title of the appellants to be regarded as the true and first inventors, and no publication of a later date is either in fact or in law a prior publication or an anticipation of the said invention. The grant of the Colonial letters of registration was conclusive as to the extension of the patent to the Colony, and placed the holder in the same position in the Colony as he held at the date of the patent in the country where he obtained it.

Neville, Q.C., *Haldane*, Q.C., and *Molloy*, for the respondents, contended that the Court below was right in its answers to the 5th and 6th questions stated in the special case. The grant of letters of registration is, by the true construction of the Act of 1888, rendered void in the same manner as a Colonial patent would be rendered void. In other words, letters of registration are revocable for any cause which would render a Colonial patent void. Prior publication or user would have that effect upon a Colonial patent; it has the same effect on letters of registration. Accordingly, the grant of letters of registration does not preclude evidence as to the invalidity of the British patent within the Colony. Novelty in the Colony is an essential condition to the validity of the rights granted by the letters of registration; the effect of the Act (see s. 49) being to enable the holder of a valid patent to register it without formality or delay. It does not enable him by registration to cure any invalidity which attaches to the patent itself at the date of registration. It is necessary in an action for infringement of a registered patent to shew that the patent is valid in the country which grants it: that the letters of registration are valid in the Colony which registers it. It is of the very essence of patent law, and of the Crown's right to patent, that it should be of something newly communicated to the public. A law which merely facilitates the registration of a patent cannot be construed as extending it without clear words to that effect. Reference was made to *Bush* v. *Fox* (1); *Harris* v. *Rothwell*. (2)

With regard to the questions raised by the cross-appeal, it was contended that upon the true construction of the Act of 1888 renewal fees, in addition to the initial fees, were payable; and as this had not been paid the letters of registration lapsed. No leave to amend had been given in accordance with the provisions of the Act. No leave to amend the specification in respect of which letters of registration had been granted had been given in accordance with the Act. It had been amended by the registrar as of course so as to make it correspond with

(1) (1856) 5 H. L. C. 707. (2) (1887) 35 Ch. D. 416, 428.

J. C.
1900
AUSTRALIAN GOLD RECOVERY COMPANY v. LAKE VIEW CONSOLS.

an amended specification of the invention protected by the British patent. Ten months afterwards advertisements in regard to the amendment already made were issued under s. 26 with invitation to persons intending to oppose under s. 23, sub-s. 2. These sections only applied before amendment was made. No leave to amend was either asked for or obtained.

Bousfield, Q.C., replied, and contended, in answer to the cross-appeal, that the letters of registration were not conditional on the payment of renewal fees, and that in fact all fees payable had been paid. As for the amendment, whatever irregularities there had been, the amendment had been made by the leave of the registrar in the manner and on the terms directed by him. That was conclusive as to the right to amend: see s. 23, sub-s. 9.

1900
Dec. 8.

The judgment of their Lordships was delivered by

LORD DAVEY. The appeals in this case are from an interlocutory judgment of the Supreme Court of Western Australia, dated September 19, 1899, and given on a special case stated in an action in which the appellants in the principal appeal (the Australian Gold Recovery Company, Limited), were plaintiffs, and the respondents in the principal appeal and appellants in the cross-appeal (the Lake View Consols, Limited), were defendants. The object of the action was to restrain the Lake View Consols by injunction from infringing certain letters of registration having the force of a patent belonging to the Australian Gold Company. Eight questions were asked by the special case, of which the first four were decided in favour of the Australian Gold Company, and the last four in favour of the Lake View Consols.

The most important question is the one numbered 6. The answer to it turns on the true construction and effect of s. 49 of the West Australian Patent Act, 1888, by which holders of patents obtained in Great Britain or any other country are enabled to obtain letters of registration in the Colony. The Australian Gold Company, being the holders of a British patent, No. 14,174 of 1887, have obtained letters of regis-

tration in respect thereof, upon which they are suing. The question is:—

"Whether any common knowledge, prior user, or prior publication in Western Australia, subsequent to the date of the letters patent, No. 14,174 of 1887, can affect the plaintiffs' said letters of registration, No. 189?"

The Court has decided this question in the affirmative. The Australian Gold Company say, wrongly.

Sect. 49 of the Act of 1888 is as follows:—

"No person shall receive a patent or an instrument in the nature of letters patent under this Act for an invention or discovery which has been previously patented in Great Britain or any other country, but it shall be lawful for the Governor in his discretion, on the application of any person being the holder or assignee of any patent granted or issued in Great Britain or any other country for any new discovery or invention, and upon such proof as the Governor may deem sufficient that such person is the bonâ fide holder or assignee of the said patent, and that the same is in full force, and upon payment to the Colonial Treasurer of the sum of fifteen pounds, to grant letters of registration under the seal of Western Australia to the holder of such patent as aforesaid or his assignee, and such letters of registration shall be deposited in the Patent Office and shall be deemed to be letters patent issued under this Act for such invention or improvement, and shall have the same force and effect as letters patent issued thereunder, and shall inure to the benefit of the holder during the continuance of the original patent in the country in which it was issued or granted and no longer, and all the provisions of this Act shall apply to such letters of registration in the same way mutatis mutandis and as fully as to letters patent or an instrument in the nature of letters patent issued under this Act."

There is no form of letters of registration scheduled to this Act. There is a form of patent which is substantially the same as the form scheduled to the British Act of 1883. The letters of registration in the present case are obviously based on the form of patent which the draftsman has adapted to the purpose, but not always with great skill. In the defeasance

J. C. 1900

AUSTRALIAN GOLD RECOVERY COMPANY v. LAKE VIEW CONSOLS.

clause it is provided that, if it shall be made to appear, &c., "that the said invention is not a new invention as to the public use and exercise thereof," the letters shall be void. An argument was founded on these words to the effect that as the letters were expressly made void by prior user, but nothing was said as to prior publication, it was not intended that prior publication should avoid letters of registration. Their Lordships think that the words "public use and exercise" mean use and exercise within the Colony. The words must clearly have some limitation, and in a Colonial document they must mean what they would mean if used in letters patent granted in the Colony. The argument, however, fails, because exactly the same argument might be used of every English patent. The defeasance clause says nothing about prior publication—yet all the world knows that patents may be avoided by proof of prior publication. Moreover, it should be observed that the letters of registration are also made void "if this grant is contrary to law," which raises the whole question. But their Lordships think that no assistance can be derived from the language of the letters themselves, which is not statutory under the Act of 1888, and the answer to the question must be determined on the language of the Act.

Learned counsel argued that the effect of the section was merely to extend the foreign patent to the Colony, and to give the holder of the foreign patent the same rights in the Colony as he possessed in the country of origin, and that the letters of registration must stand or fall with the patent, or (in other words) they could not be impeached on any ground which would not be equally fatal to the patent in its own country. They therefore denied that prior publication or even prior user in the Colony after the date of the patent affected the letters of registration, though they were disposed, if possible, to draw a distinction between prior user and prior publication. In the opinion of their Lordships no such distinction can be made. If prior publication is innocuous, prior user must be equally so under the Act.

The Act says that the letters of registration shall be deemed to be letters patent issued under the Act (that is) to be a

Colonial patent, and that all the provisions of the Act shall apply to the letters of registration as fully as to letters patent issued under the Act. Their Lordships are of opinion that the effect of these words is to attach to letters of registration all the statutory incidents of letters patent, and to bring in all the statutory provisions subsequent to the granting of a patent. Now one of these provisions is contained in the 31st section. Sub-s. 2 of that section provides that revocation of a patent may be obtained on petition to the Court, and sub-s. 3 that every ground on which a patent might at the commencement of the Act be repealed by scire facias shall be available by way of defence to an action for infringement, and shall also be a ground of revocation. It cannot be, and was not disputed, that prior publication or user was a ground on which a patent might be repealed by scire facias. But their Lordships would prefer to put this case on a broader ground. By the provisions of the 49th section, the Governor is empowered to grant a monopoly within the Colony in some manufacture or process to the grantee of the letters of registration. It is contrary to the common law of this country (which the Australian settlers carried with them), as well as to the Statute of Monopolies for the Crown, to grant a monopoly to any person of any known manufacture. The Statute of Monopolies has been held to be only declaratory of the common law. Two reasons have been assigned for this rule of law—first, that a man cannot lawfully be deprived of the right to use a known art or trade; and, secondly, because if an invention is known, the public can receive no consideration from the patentee for the grant of the sole right of exercising it. No doubt the Legislature may overrule the common law, and authorize the grant of a monopoly of the exercise of a known manufacture. But their Lordships think that such an intention would have to be very clearly expressed, and no implication having an effect so injurious to the subject ought to be made without express words of enactment.

Their Lordships think that the provisions of s. 49 merely afford a machinery by which the holder of a foreign patent may obtain protection for his invention within the Colony

J. C. 1900

AUSTRALIAN GOLD RECOVERY COMPANY v. LAKE VIEW CONSOLS.

without the formalities and delay necessary on an application for a patent, but subject to all the incidents and conditions to which letters patent would be subject. They therefore agree with the Court below.

Questions 5, 7 and 8 were not pressed by learned counsel. Indeed, questions 7 and 8 seem to have been asked under some misapprehension. It is perfectly immaterial whether Siemens' patent was good or bad if it is merely relied on as a prior publication of the invention protected by the letters of registration.

The consequence, therefore, is that the principal appeal of the Australian Gold Recovery Company ought to be dismissed, and their Lordships will humbly advise Her Majesty accordingly.

To turn to questions 1, 2, 3, 4, which form the subject of the cross-appeal. Questions 1 and 2 may be taken together, and the point raised is whether the renewal fees charged by the 2nd schedule of the Act on letters patent are payable in respect of the letters of registration. Their Lordships have had some difficulty in coming to a satisfactory conclusion on this point. There are considerations which tend both ways. On the one hand, attention is called to the enactment that the provisions of the Act are applicable mutatis mutandis to letters of registration. Why not therefore apply s. 29 and the schedule referred to in it? Some of the items in Sched. II. certainly would apply to letters of registration, and there is no reason (it is said) for excluding the payment of the fees to be paid on every patent at the expiration of four years and seven years from its date. On the other hand, it is pointed out that a fee of 15*l.*, exceeding the aggregate fees payable on the application for a patent, is payable on application for letters of registration; and, further, that as letters of registration last only so long as the patent on which they are founded, the periods or epochs in the life of the one are or may be quite different from those in the life of the other. It is argued that the fees payable on renewals should be regarded as fixed with reference to the scale of fees payable on and consequent on application, which do not apply to letters of registration. The learned judges

have answered the first question in the negative, and their Lordships are not prepared to say they are wrong.

The third question is whether under the circumstances set out in the special case the specification deposited with the application for letters of registration was as against the defendants in the action duly amended. These circumstances were shortly as follows: "The specification of the British patent was amended. On October 15, 1895, the agent of the holder of the letters of registration by letter requested the registrar of patents in the Colony to record the amendment of the British specification." Without issuing any advertisements or any further proceeding the registrar recorded the amendment in his office. But more than a year afterwards the registrar published notice in the Government Gazette that the complete specification had been amended, and at the same time invited any persons intending to oppose "the said application for amendment" to come in within one calendar month from the date thereof. What the intention of this remarkable document was it is hard to say.

Their Lordships think that the provisions of s. 23 of the Act as to "amendment of specification" are made applicable by s. 49 to letters of registration, and that mutatis mutandis the specification deposited with the application for and referred to in the letters of registration is the "specification" within the meaning of s. 23. The request contained in the letter of October 15, 1895, was in no sense an application for leave to amend, but was what it purported to be, and what the registrar understood it to be—namely, a request to him to record an amendment already made. The registrar did not exercise any judgment in the matter, but appears simply to have recorded it. The counsel for the Australian Gold Company supported the registrar's view, and in the alternative argued that it was a casus omissus in the Act, and fell within the Patent Office regulations respecting the amendment of any document, for which no special provision is made. Their Lordships cannot agree with this suggestion, and they think that there ought to have been, but there was not, an application to the registrar in the Colony for leave to amend the specification. Persons in

J. C. 1900

AUSTRALIAN GOLD RECOVERY COMPANY v. LAKE VIEW CONSOLS.

the Colony had no opportunity and probably no locus standi to oppose the amendment of the specification in London, and considerations might apply to the grant of leave to amend in the Colony different from those which could be brought before the comptroller in London. The learned judges in the Court below seem to have been of the same opinion; but they thought they were bound by certain decisions in England, that the propriety or regularity of the leave to amend cannot be controverted in a subsequent action for infringement of the patent. But those cases have no application to a case like the present one, in which leave to amend has neither been asked for nor granted; but the registrar has simply recorded the amendment without any jurisdiction to do so. Their Lordships, therefore, will humbly advise Her Majesty that the order so far as relates to the answer to the third question be reversed, and that that question should be answered in the negative.

The fourth question answers itself. To make it consistent, however, with the answer to question 5, it will be better to add to the answer as it stands the words "except so far as they may be grounds of objection applicable to the letters patent, No. 14,174." They will, therefore, humbly advise Her Majesty that the answer to the fourth question be varied in this manner.

The result is that the principal appeal wholly fails and the appellants should pay the costs of it, and that the appellants in the cross-appeal have partly failed and partly succeeded and should have no costs of their appeal. The costs in the Court below were reserved, so nothing need be said about them.

Solicitors for appellants: *Davidson & Morriss.*
Solicitors for respondents: *Burchells & Co.*

[PRIVY COUNCIL.]

MELBOURNE TRAMWAY AND OMNIBUS COMPANY, LIMITED . . . . } APPELLANTS;

AND

MAYOR, &c., OF THE CITY OF FITZROY . . . . . } RESPONDENTS.

J. C.*
1900
July 18, 19;
Nov. 10.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Rateability of a Tramway—Rateable Value—Act No. 1112, *s.* 246—*Separate Assessment of the Tramway Engine-houses—Jurisdiction of Supreme Court—Mandamus to County Court to state Case—Act No.* 1105, *s.* 139—*Practice as to Security for Costs.*

The county court having in appeal materially reduced the respondents' assessment of the appellants' tramway:—

Held, that the Supreme Court had jurisdiction to issue a mandamus directing it to state the facts for their determination.

A decision of the county court in a rate appeal is not final under ss. 60, 61 of Act No. 1243 of 1891. Those sections must be read with and are qualified by s. 139 of No. 1105 of 1890, which in effect enacts that the Court may be required to state a case in "all appeals": an expression which on its true construction includes rating appeals.

Held, also, that the land of the appellants' tramways, though its ownership is vested in the Crown, is occupied by the company and used for the profit of its members, and is rateable property, not falling within the exception in s. 246 of Act No. 1112. The rateable value of its occupation is the gross profit of the concern, from which 10 per cent. on the capital outlay is rightly deducted. That value cannot be affected by the amount of consideration paid to acquire occupation whether in the shape of rent or instalments of purchase-money.

Pimlico, &c., Tramway Co. v. *Greenwich Union*, (1873) L. R. 9 Q. B. 9, approved.

Where a tramway runs through several municipalities, but has its engine-houses in one of them:—

Held, that the separate rating value of the engine-houses taken at 5 per cent. on the fee simple value should be deducted from the rating value of the whole concern and allotted to the municipality in which they stand, and that the remainder of the rating value should be shared among the different municipalities according to the length of the tramway in each.

APPEAL by special leave—(1.) from an order of the Full Court (Sept. 21, 1899) upon a case stated by the county court

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR HENRY STRONG.

J. C.
1900
MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &C., OF THE CITY OF FITZROY.

at Melbourne; (2.) an order of the same Court (Feb. 9, 1900) discharging a previous order of the Chief Justice, and refusing leave to appeal to Her Majesty in Council from the first-mentioned order.

The main question decided was as to the rateable value of the appellants' tramway, so far as it lay within the city of Fitzroy.

The appellant company was incorporated under the Companies Statute, 1864 (Victorian Act, 27 Vict. c. 190). Its tramway came into existence under the Melbourne Tramway and Omnibus Company's Act, 1883 (47 Vict. No. 765). It carries on its business in the city of Fitzroy, the city of Melbourne, and other cities and towns in the neighbourhood thereof. The Act last mentioned provided in the first instance for the construction, maintenance, and working of the tramways by the appellants with the consent of the local authorities and under the control of a tramways board; but by means of a form of agreement set out in the 4th schedule to the Act, an alternative scheme (which was ultimately adopted) was provided, whereby a body called the Melbourne Tramways Trust (hereafter referred to as "the trust") was constituted and was empowered to construct the tramways without any consent of the local authorities by means of money raised on its debenture bonds, and to grant a lease of such tramways to the appellants for a term of thirty years.

In pursuance of this scheduled agreement the trust granted to the appellants a lease, dated June 30, 1888, of the tramways and other property therein mentioned for the considerations therein appearing for a term of thirty-two years from July 1, 1884.

The respondents assessed the value of the rateable property of the appellants in the city of Fitzroy for the years 1896–97 at 13,225*l.*, and the rate for 1896–97 at 1322*l.* 10*s.*

In appeal Casey J. of the county court reduced this valuation to 1682*l.* It was common ground before him that the proper method of arriving at the "net annual value" of the appellants' rateable property was to ascertain the gross annual receipts of the company for the years 1895–96, and to make

therefrom all proper deductions in order to arrive at the net rent for rating purposes of the said rateable property. The appellants claimed to deduct, inter alia, payments for debenture interest, sinking fund, and tramway trust expenses; and, further, that the engine-houses situated within the said city should be rated as part of the whole undertaking, and not separately.

The judge decided in favour of these contentions, and refused to state a case under s. 139 of 54 Vict. No. 1105. The case was eventually stated in obedience to a mandamus issued by the Supreme Court on May 17, 1898; and the substance thereof is sufficiently stated in the judgment of their Lordships.

On June 12, 1899, the Supreme Court ruled to the effect that the deductions for interest, sinking fund, and tramway trust expenses had been improperly allowed by the county court judge, and must be disallowed; and that with respect to the engine-houses, they must, in the words of Holroyd J., "be included in the valuation of the whole undertaking, but must be valued separately for the purpose of being rated to the municipalities within whose districts they respectively lie, and their respective net annual values must be subtracted from the net annual value of the undertaking before its apportionment."

On September 21, 1899, the Supreme Court, in application of the principles which it had laid down, fixed the annual value of the appellants' rateable property within the municipality of the city of Fitzroy for the year 1896–7 at the sum of 10,423*l.*, and the rate in respect thereof at 10*d.*

An appeal having been admitted to Her Majesty in Council, the respondents appealed to the Full Court from the order to that effect, which was in consequence set aside and discharged on the ground that the Order in Council of June 9, 1860, relating to security to be given by the appellant, had not been complied with.

The Order in Council prescribed that in all cases security shall be given by appellant "in a bond or mortgage or personal recognizance not exceeding the value of 500*l.* sterling." The Court held that, although the appellant had duly executed

J. C.
1900
MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &c., OF THE CITY OF FITZROY.

bonds in favour of the respondents, and had, in accordance with the ordinary practice, lodged them with the prothonotary of the Supreme Court, and, further, had deposited with him 400*l.* as security for the fulfilment of its obligation, it nevertheless had not manually delivered the said bonds to the respondent council.

Asquith, *Q.C.*, *Isaacs*, *Q.C.*, and *Mansfield*, for the appellants, contended that the objection that the bonds had not been handed to the respondents was invalid, for the Order in Council did not impose any obligation to that effect, that the appeal was rightly admitted in the first instance, and that its revocation was cured by special leave having been granted.

The decision of the county court was correct, and being in a rating appeal was final and conclusive on all points: see s. 60 of the Local Government Act, 1891 (No. 1243). Sect. 139 of the Justices Act, 1890 (No. 1105), has no application to rating appeals, and therefore as regards this case prevails over Act No. 1112, s. 277: see *Melbourne Tramway, &c., Co.* v. *Mayor, &c., of Melbourne* (1), and also *Mayor, &c., of Prahran* v. *Carter*. (2) Upon the question of the appellants' rateability it was contended that the tramways and other property devised to them were not rateable within the meaning of the Local Government Acts. Reference was made to the Local Government Act, 1890 (No. 1112), ss. 246, 395, and 410; especially to that part of s. 246 which excepts from rateability "land the property of Her Majesty which is unoccupied or used for public purposes . . . . land vested in or in the occupation of or held in trust for the municipality or the council thereof." The tramways and other property leased to the appellants, so far as they lie within the municipal limits of any municipality, are vested in such municipality or are held in trust for the same, either solely or jointly with other municipalities. Or it is the property of Her Majesty which is used for public purposes. In either way it is not rateable under s. 246. The respondents have no statutory right to rate the tramway

(1) (1898) 24 V. L. R. 33. (2) (1889) 15 V. L. R. 228, 232.

or other property. Its right arises under clause 14 (5) of the scheduled agreement, and is regulated and limited thereby. It arises thereunder "in respect of its use of the tramway." This use must have regard to the profit derived from it. It is not the same thing as a mere occupation rate. Even if rent were the test of value, it would be rent subject to the payments to be made to the trust. In any case, according to the true construction of the scheduled agreement—see especially sub-ss. 4 and 5 of clause 14—read by the light of the Act (47 Vict. No. 765), the appellant is entitled to make the deductions claimed. For the profit-earning capacity of the appellant's use of the tramway is restricted or diminished by the obligations imposed on the appellant by the various provisions of clause 14 of the agreement. The deductions or payments in question are expenses necessary to maintain the rateable subject-matter—that is, the "use of the tramway"—in a state to command any rent. Until those payments are discharged the appellant has no beneficial use of the tramway, and, moreover, the beneficial interest in the payments is in the rating authority, and it was not contemplated by the scheduled agreement that the appellant should be rated in respect of the benefit accruing to the rating authority or to the trust. They are, further, part of the working expenses of the appellant's business. Reference was made to *Sculcoates Union* v. *Dock Company at Kingston-upon-Hull* (1); *Mayor of Lincoln* v. *Holmes Common.* (2)

As regards the engine-houses and their sites, they should be included in the undertaking, and the whole should be rated as one concern. They ought not to be separately assessed, because the engine-houses were inseparably connected with the engines and machinery within them. They accordingly were part of the equipment of the tramways themselves, and so came within the words "use of tramway" in clause 14, sub-s. 5, of the scheduled agreement.

Balfour Browne, Q.C., *Cripps, Q.C.*, and *Lewis Coward*, for the respondents, contended that the property rateable was the

(1) [1895] A. C. 136, 145. (2) L. R. 2 Q. B. 482.

J. C.
1900
MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &C., OF THE CITY OF FITZROY.

tramways and not the appellants' share of the profits of the tramway undertaking. The appellants were using and working the tramways under the deed of June 30, 1888, which contained a covenant imposing on the appellants liability to pay to the municipalities through which the tramway passed the rates lawfully leviable by them. Under clause 14, sub-s. 5, of the scheduled agreement, the municipalities were "entitled to rate the company in respect of its use of the tramway," and that user has been taken to be equivalent to occupation. Under the Local Government Act (54 Vict. No. 1112), part 10, sections (246–303) as amended in 1891 by 55 Vict. No. 1243, s. 55 et seq., the property rateable is to be computed "at its net annual value—that is to say, at the rent at which the same might reasonably be expected" to let from year to year free from all "usual tenants' rates and taxes, and deducting therefrom the probable annual average cost of insurance and other expenses (if any) necessary to maintain such property in a state to command such rent." See *Pimlico, &c., Tramway Co.* v. *Greenwich Union* (1), which is subject to enactments (32 & 33 Vict. c. 67, and 33 & 34 Vict. c. 78) closely resembling those applicable in the present case: see also *Mayor, &c., of Essenden* v. *Blackwood* (2); *Lancashire Telephone Co.* v. *Overseers of Manchester* (3); *Holywell Union and Halkyn Parish* v. *Halkyn Drainage Co.* (4) The appellants are subject to ordinary municipal rates ascertained in the usual manner. The Supreme Court was right in disallowing the deductions claimed by the appellants. No mention is made in the rating Acts of any deduction for interest on money borrowed for or employed in the construction or creation of property which is the subject of valuation under those Acts. In the absence of express provisions it cannot be imputed to the Legislature that it intended any new or special method of assessment applicable to the appellants. It cannot be contended that expenditure of money in the construction of tramways diminishes the net annual value thereof to a tenant. It is settled law in the Colony that no such deduction as that claimed in this case and allowed by the county court is

(1) L. R. 9 Q. B. 9.
(2) (1877) 2 App. Cas. 583.
(3) (1884) 14 Q. B. D. 267.
(4) [1895] A. C. 117

permissible: see *Shire of Bungaree* v. *Ballarat Water Commission* (1), and compare *Reg.* v. *West Middlesex Waterworks.* (2)

With regard to the engine-houses and their sites, it was contended that as they lay wholly within the city of Fitzroy and were capable of separate assessment, they ought to be so assessed in the same way as the car sheds and other tramway buildings as to which the appellants conceded separate assessment. There was nothing in the appellants' Acts which justified their exclusion from the application of the parochial principle on the ground of the engine-houses being so completely part of the equipment of the tramway as to come within the words "use of the tramway" in sub-clause 5 of clause 14 of the scheduled agreement.

Then as to the question of the Supreme Court's jurisdiction, it was contended that a well-defined practice had existed ever since local government was established under which cases with respect to rates have been stated, and the Supreme Court has dealt with them as a Court having power to supervise the mode of dealing with rating appeals. The practice has prevailed notwithstanding the words of conclusiveness in the Local Government Act relied upon by the appellants, and has not been expressly interfered with by the Legislature: see also s. 139 of the Justices Act, 1890, which makes provision for every form of appeal. As regards the proceedings for obtaining special leave to appeal, it was contended that the order of February 9, 1900, should be confirmed, because the security for costs which was directed to be given by the orders of October 4 and December 21, 1899, was not given to the person entitled to receive it within the time limited by the said orders, and the Order in Council of June 9, 1860.

Isaacs, Q.C., replied.

1900
Nov. 10.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. This appeal is not unimportant to the parties directly concerned; and it derives greater importance from the fact that it involves a controversy on the principle of levying local rates which is pending between the appellants and

(1) (1873) 4 A. J. R. 187. (2) (1859) 1 E. & E. 716.

J. C.
1900
MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &C., OF THE CITY OF FITZROY.

other local authorities besides the respondents; and another controversy on procedure which affects rating authorities and ratepayers generally.

The appellants carry on their business in the city of Fitzroy and several other cities or towns under the provisions of Acts of Parliament passed in the years 1883 and 1884. For the year 1896–97 the appellants were rated by the respondents at 10 per cent. on the assessed value of 13,225*l*. The appellants objected to the principle on which the value was assessed, mainly because the respondents refused deductions for certain classes of outgoings. They appealed to the county court, and on March 15, 1898, Judge Casey, who presided in that court, decided in accordance with their contention, reducing the valuation from 13,225*l*. to 1682*l*. In May, 1898, either on the 12th or the 17th, the Supreme Court issued a mandamus to Judge Casey, directing him to state the facts for their determination. The appellants appealed to the Full Court on the ground that the decision of the county court in a rate appeal is final and conclusive, and that the mandamus was issued without jurisdiction. On July 26, 1898, the Full Court dismissed the appeal, and the soundness of that decision is challenged in the present appeal.

Their Lordships will first address themselves to this question, which is one of nicety and difficulty. It depends on the examination of a series of statutes relating to local government, and of another series relating to the functions of justices of peace sitting in petty or general sessions. In making that examination their Lordships have been much aided by a very full and careful judgment delivered by Hood J. in a suit between the present appellants and the corporation of Melbourne, reported in 24 Victorian Reports, p. 33.

The appellants rest their case on the provisions of the Local Government Acts of 1890 (No. 1112) and of 1891 (No. 1243). By s. 276 of No. 1112 an appeal is given on the ground of unfairness or incorrectness occurring in valuations and assessments to the court of petty sessions; and the judgment of that Court is to be final and conclusive. By s. 277 an appeal is given to the court of general sessions for any cause; the Court

is to hear the appeal in a summary way, and its decision is to be final and conclusive on all parties.

By s. 60 of No. 1243 all rate appeals, which then lay to general sessions, are to be made to the county court; the court is to hear them in a summary way, and its decision is to be final and conclusive on all points. According to the provisions of these sections, considered by themselves, the decisions of county courts in rate appeals are unimpeachable. No. 1243, however, in s. 61 enacts that all provisions of the Acts relating to such appeals to general sessions shall (subject to the provisions of No. 1243) apply to appeals to the county court. For that purpose county courts are to have all the powers and jurisdiction possessed by the court of general sessions.

But while the Legislature was passing No. 1112 it was also passing the Justices Act of 1890 (No. 1105), of which s. 139 runs as follows: "No proceeding to be had touching the conviction of any offender against any Act, or touching any order made or any other matter or thing done or transacted in or relative to the execution of any Act, shall be vacated or quashed for want of form or be removed or removable (except as hereinafter mentioned) by certiorari or any other writ or process whatsoever into the Supreme Court; but in any case of appeal the court of general sessions before whom the same is heard and determined shall, if so required by any party to such appeal, state the facts specially for the determination of the Supreme Court thereon, in which case that Court may determine the same, any Act to the contrary notwithstanding." The literal construction of these words is quite clear, namely, that the court of general sessions may be required to state a case in all appeals, without any apparent exception of rate appeals. There is, therefore, a contradiction between the two simultaneous directions of No. 1105, s. 139, and No. 1112, s. 277, and there must be some qualification of the literal meaning of one or the other in order to bring out any sensible result.

It is, indeed, suggested by the appellants that No. 1243, passed in the next year, disposes of the matter by providing that the decisions of the county court shall be "final and

J. C. 1900 MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &c., OF THE CITY OF FITZROY.

conclusive on all points." This, it is urged, is different from being "conclusive on all parties"; it embraces points of law as well as of fact, and shuts out the explanation that enactments of finality, coupled with provisions for consideration on a stated case, mean that the finality does not extend to points of law.

But in No. 1243 itself, immediately after the provision for finality in s. 60, comes s. 61, applying to rate appeals all the provisions of other Acts, and giving to county courts all powers and jurisdiction possessed by courts of general sessions. That would include the jurisdiction, and with it the obligation, to state a case, unless there is some provision to prevent it. It is true that all this is done "subject to the provisions of this Act." But all this portion of the Act is aimed at substituting county courts for general sessions in rate appeals, and to those provisions the whole is subject. It is almost inconceivable that the framers of the Act should have deliberately intended to make an alteration of a different kind, and of great importance in jurisdiction, by the obscure process of writing in the word "points" instead of "parties." That is the only "provision" in No. 1243 calculated to exclude the operation of s. 139 of No. 1105. It was then, and had long been, the practice of courts of general sessions to state cases in rate appeals, and that practice must have been well known to all persons familiar with these branches of law. If there had been an intention to prohibit that practice, something more direct and definite would surely have been said.

The existence at that time of the practice of stating cases in rate appeals is not disputed, though it has been disputed at the bar whether or no it has continued up to the present time. In his judgment delivered in this case the learned Chief Justice speaks of it as a well-defined practice which has prevailed from the earliest time since local government has existed. Hood J. has known instances in the year 1892. He does not think it necessary to trace it back earlier than the year 1865. By the Municipal Corporations Acts of 1863 (No. 176, ss. 199–201, and No. 184, ss. 199–201) provisions were made for rate appeals to petty sessions and general sessions respectively, in terms

corresponding to those used in No. 1112, including the provisions as to finality. But by the Justices Act of 1865 (No. 267, s. 135) the courts of general sessions had power to state a case "in any appeal."

At that time then, if no earlier, the framers and readers and administrators of Sessions Statutes found in Local Government Acts general expressions of finality for decisions in rating appeals, coupled with the provision in Justices Acts of one special mode of questioning the finality of the same decisions. It is a hazardous use of language, and difficulties have sprung from it in other statutes and other departments of law; but it seems to have found favour in Victoria. Hood J. says truly that throughout the legislation on rate appeals appears a desire that the decision of the Appellate Court should be final, and also an intention to allow reconsideration by means of stating cases. It is pointed out by him and also by Madden C.J. that unless there is some machinery for such reconsideration by some tribunal the common superior of all, the courts are certain to diverge in opinion, and there will be diversity of laws in every separate area of a court of general sessions or of a county court. The learned judges below have no right, and this Board has no right, to set up practice or policy against clear enactments. But when the Legislature has spoken with two voices, it is very much to the purpose to shew which voice has in fact been listened to by suitors and by administrators of the law, and which must lead to confusion such as all statesmen desire to avoid.

The most plausible argument in favour of the appellants is that which seeks to qualify s. 139 of No. 1105 by saying that it does not apply to rating appeals at all; by which process one of the discordant voices is silenced, while the other speaks. It is urged that the obligation of stating a case is laid upon the court of general sessions in substitution for the writ of certiorari which is taken away; the section is mainly directed to criminal cases, and is at all events satisfied by confining it to matters within the ordinary jurisdiction of the court of general sessions derived from common law. This reasoning, however, cuts down the generality of the words used, not only in the latter

J. C. 1900

MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &C., OF THE CITY OF FITZROY.

part of the section, "any case of appeal," but in the former part, which includes "any other matter or thing done or transacted in or relative to the execution of any Act"; and its departure from the literal meaning of the words is hardly if at all less than that which is made by imposing a qualification on the provisions for finality.

Then it is suggested that rate appeals are the creation of the Local Government Acts, which require finality; whereas the duty of stating cases is found in the Justices Acts, which are mainly directed to other matters; and that in case of conflict the directions which relate to the more specific matter should prevail. But there is too much blending of rate appeals with other appeals for the successful use of this argument. It is not the case that a series of Local Governments Acts lays down one set of rules for rate appeals, and a series of Justices Acts another set for other appeals. Rate appeals are dealt with expressly by the Justices Acts, sometimes being separately mentioned and sometimes included under the general term of "appeals." In the Justices Act of 1876 (No. 565), ss. 23 to 33 lay down rules relating to appeals, which must include rate appeals because here and there the latter are excepted and made subject to a separate provision. Then s. 34 speaking of appeals generally gives to the parties, by mutual consent and by order of the Supreme Court, power to state a case for the Supreme Court without requiring any decision by the court of sessions. Sect. 36 is the same with s. 139 of No. 1105 in all respects except that it confers a power instead of laying a duty on the court of sessions to state a case. It would be a very forced construction of No. 565 to hold that s. 36 differs as to its subject-matter from the group of which it forms part, and when it speaks of "any case of appeal" does not include rate appeals. Why then should not the same words be held to include them when transferred to s. 139 of No. 1105? Moreover, s. 36 itself is taken from s. 11 of 12 & 13 Vict. c. 45, which provides for stating a case in appeal against any "judgment order, rate, or other "matter." The Victorian legislation does not enumerate these particulars, but it uses general terms of a nature and in a context adapted to embrace them all.

As for the other parts of s. 139, the model of it is to be found in the English Highway Act of 1835. That Act gives an appeal in rate cases to quarter sessions, and makes the decision on appeal binding and conclusive on all parties to all intents and purposes whatsoever: s. 105. Afterwards come ss. 107, 108, which take away the general right of certiorari, but give power to the quarter sessions to state a case "in any case of appeal," and on that a writ of certiorari may issue. It is true that the subject-matter of the English statute puts it beyond doubt that rate appeals are included. Still the mode of drafting adopted is to provide in the most emphatic and unqualified terms for finality, and afterwards to introduce a provision the effect of which is to qualify the finality. And unless the Victorian Legislature intended to bring about the same result, it is strange that in these two simultaneous statutes they should have used forms of words corresponding with the English model.

All these lines of inquiry lead up to the conclusion that in s. 139 "any cases of appeal" includes rating appeals; and so the appellants fail to shew that the statutes speak in their favour without contradiction. Their Lordships feel, as every judge who has addressed himself to the subject has felt, the difficulty of the question. It is one of those difficulties in the face of which this Board would hesitate to disturb the decision of the Supreme Court on a point intimately connected with its own practice, even if their Lordships' minds had been more hardly pressed by the arguments for the appeal than they have been. On the best opinion they can form the learned judges below have reached the most reasonable conclusion of which these unskilfully drawn Acts admit—namely, that the expressions of finality in No. 1243 must be taken as limited and qualified by the provisions of No. 1105, and that the Supreme Court had jurisdiction to grant the mandamus of May, 1898.

On the hearing of the special case the legal position of the parties appeared to be as follows. The appellant company was incorporated in 1864 and obtained powers to construct tramways in various municipalities. In 1883 an Act was passed, part of which is an instrument contained in its 4th schedule,

J. C. 1900

MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &c., OF THE CITY OF FITZROY.

and called the scheduled agreement. By it the municipalities affected received power to establish a new corporation composed of members selected from themselves. This was called the tramways trust. It was vested with the powers of the company, and was placed under obligation to construct the contemplated tramways within five years, and to grant to the company a lease of them for thirty years from the time when interest should begin to run upon the loan which the trust was to raise.

The 14th paragraph of the scheduled agreement lays down the principal provisions of the lease. The company is to pay to the trust interest on the capital borrowed by the trust (sub-s. 1). It is also to pay to the trust annual instalments to form a sinking fund in reduction of the loan—namely, during the first ten years of the lease 1½ per cent. on the borrowed capital, during the next ten years 2 per cent., and during the last ten 3 per cent. (sub-s. 2). It is to maintain the roadway on which the rails are laid to the satisfaction of the trust (sub-s. 3).

Sub-ss. 4 and 5 are as follows:—

"(4.) In consideration of the payments aforesaid, the trust shall give to the company possession of the several tramway lines according as such shall be completed and shall be available for the running of carriages thereon, and the company shall during the currency of the lease have the sole right of use of the tramway, with carriages having flange wheels, or other wheels suitable only to run on the rails of the tramway, and also of demanding and taking the tolls and charges authorized by the Act. Provided always that the company shall not be entitled to exact fares or tolls exceeding those specified in the Act. And the company shall be liable to no other payment to the trust or to the several corporations represented thereon for proportion of profits or otherwise howsoever, except for municipal rates."

"(5.) Each corporation within the limits of whose municipality any portion of the tramway shall be, shall during the currency of the lease be entitled to rate the company in respect of its use of the tramway, and to receive and recover from the company all rates due in respect thereof."

Sect. 45 of Act provides that—

"Notwithstanding anything in this Act contained, the company shall not acquire, or be deemed to acquire, any right other than that of user of any road along or across which it shall lay any tramway."

Some variations were afterwards made as to the number and duration of the leases, but they do not affect the question of rating. On June 30, 1888, before which time the tramways now in question were completed by the trust, a consolidated lease was granted by the trust to the company, running for thirty-two years from July 1, 1884. In it the company covenants to pay interest on the loans raised by the trust, then amounting to 1,200,000*l.*, and the statutory payments to the sinking fund. Those payments are to continue to July 1, 1916, unless that fund shall previously be sufficient to meet the whole debt and expenses of the trust. If the papers are insufficient for that purpose the company is to make up the deficiency. All those annual payments are to be chargeable as rent, with the usual remedies for the recovery of rent. The company further covenants to pay salaries to the officers of the trust to the extent of 1000*l.* per annum, and to pay to the municipalities all such rates, taxes, and assessments as shall be lawfully levied or payable to them respectively in respect of the tramways passing through their municipal districts.

The statutes of Victoria have followed the English statutes in defining the principles on which property is to be rated. By Act No. 1112, s. 246, it is enacted—

"All land shall be rateable property within the meaning of this Act and of the Acts relating to the incorporation of the city of Melbourne and town of Geelong, save as is next hereinafter excepted—that is to say, land the property of Her Majesty which is unoccupied or used for public purposes . . . . land vested in or in the occupation of or held in trust for the municipality or the council thereof."

And by the same Act, amended by No. 1243, the property rateable is to be computed "at its net annual value—that is to say, at the rent at which the same might reasonably be expected to let from year to year free from all usual tenants'

J. C.
1900
MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &C., OF THE CITY OF FITZROY.

rates and taxes, and deducting therefrom the probable annual average cost of insurance and other expenses (if any) necessary to maintain such property in a state to command such rent."

No mention is made of any deduction for interest or money borrowed for or employed in the construction or creation of the property which is the subject of valuation.

It is not necessary to state the figures which have been worked out by the Courts below. There is no dispute as to the amount of the gross profit made by the company. The company does not now claim any of the deductions which Casey J., and after him the Supreme Court, have disallowed. The city no longer disputes the claims to deductions which have been allowed by the Supreme Court. The company has been allowed all the deductions allowed by the Rating Acts. The controversy is narrowed down to the questions whether Casey J. was right in deducting from the gross profits of the company its payments for interest on loans and for sinking fund, items amounting to 110,000*l.*, and whether the valuation of certain engine-houses has been rightly adjusted. On September 21, 1899, the Supreme Court issued its final order deciding these matters in favour of the city, with the effect that for the municipal year 1896–7 the value of the company's rateable property in the city is fixed at 10,423*l.*, and the rate at 1043*l.* The company contends in this appeal that the Supreme Court has erred on the three points in controversy.

The first two questions resolve themselves into the prior question whether the rate levied is the ordinary occupation rate or one of a peculiar kind. It is contended that ordinary rates do not fall on the company because it falls within the exceptions of s. 246 of No. 1112. But though the ownership of land used for public roads is vested in the Crown, the land now in question is not unoccupied nor used for public purposes except in the sense that the public may use it for payment. It is occupied by the company and used for the profit of its members. Nor is there any trust for the municipality.

The object of the argument just dealt with is not to deny the liability to rates, which is affirmed by the express terms of the scheduled agreement and of the lease, but to help the

further contention that the ordinary mode of finding the value of the property rated is not to be followed, but some other mode more favourable to the company. Accordingly, arguments of some subtlety have been addressed to their Lordships on the wording of sub-ss. 4 and 5 of the scheduled agreement. The drift of these arguments is, that rating the company in respect of its use of the tramway is not the same thing as a simple occupation rate; that the use of the tramway must have regard to the profit derived from it; that profit cannot be made till expenses have been met; that payments required by the scheduled agreement and lease are the necessary conditions of making any profit at all; that even admitting that the rent obtainable from a hypothetical tenant is the true test of value, nobody would offer any rent until he had allowed for the payments in question.

On careful consideration of these arguments their Lordships cannot admit their validity. Nothing is clearer than that the company is laid under the obligation of paying municipal rates. Nothing is more unlikely than that the Legislature should have intended to impose a new and peculiar kind of rate without any indication of the principles to govern it or of the methods to be followed in assessing it. It is true that the company has not acquired any right other than that of user of the roads on which it lays its tramway, and that the rate is leviable on nothing but the use of the tramway. But their Lordships do not find in these provisions any indication of a departure from the principles of municipal rating established alike in England and in Victoria. The use of the tramway is the occupation of the tramway. The position of the *Pimlico Tramway Co.* (1) resembles that of the present appellant. The enactments defining the position of the two companies are almost identical. The Pimlico Company was held to be an occupier, rateable as such, and not the less so because its occupation was restricted to a particular purpose, nor because the public also had rights over the same ground. Their Lordships agree with the Supreme Court that this company is subject to ordinary municipal rates.

(1) L. R. 9 Q. B. 9.

J. C.
1900
MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &c., OF THE CITY OF FITZROY.

It is quite true that there are difficulties in applying the test of the hypothetical tenant to property which is not subject to the competition of the market. But that is the test which the Acts of Parliament do apply; nor is it easy to see what better principle there is to apply, though in the case of unmarketable property a larger amount of conjecture is necessary than in ordinary cases. It is true, also, that in valuing a property of this kind there comes in another element of uncertainty which does not usually exist in the case of houses and land, namely, that of profit. Nobody would take the occupation and use of a tramway except for the single purpose of making profit. This difficulty, however, has been met by the somewhat inexact and rough, but essentially just, method of making an allowance for the supposed profits of the supposed tenant. Both Courts have allowed the company on this account to deduct from their gross profits the amount of 10 per cent. on their capital outlay.

But whatever the difficulties may be they hardly affect the present question. The city claims contribution to its expenses from every occupier of land within its area according to the value of his occupation. That value is what the thing is worth to use, whether it be ascertained by the hypothesis of a tenant's rent or otherwise. Its worth to use cannot be affected by the bargains which the actual occupant has made in order to acquire the occupation. They may be profitable to him or the reverse, but they do not enter into the question between him and the rating authority. In the ordinary case of houses the municipality does not, except as a possible help to get at the value, inquire what purchase-money or rent the occupier has paid or is bound to pay; either of which may be much above or much below the actual value, which is the object of inquiry.

In this case the company has in effect undertaken to make good to the trust all its expenditure in constructing the tramways, receiving for that consideration the beneficial use of the tramways for thirty-two years. If it had paid down the 1,200,000*l.* owing by the trust at the date of the lease, it could not have claimed that sum or interest upon it as so much

deduction from the value of the occupation. The mode of payment actually adopted, by paying interest on the debt and providing a sinking fund, is mere machinery. It makes the case a peculiar one in form, but not differing in substance from ordinary acquisitions of rateable property. The substance of the transaction is that the company shall have the tramways for thirty-two years on the terms of making good to the trust its whole expenditure on the tramways; and whether that be a good or a bad bargain for the company, it cannot affect the value of the occupation which it has bought, and in which the city finds it. Whether the company's payments on this account are called rent or instalments of purchase-money, they are equally the discharge of the consideration for which the company obtained its occupation, and equally inadmissible as deductions from rateable value.

Within the city of Fitzroy the company possesses three engine-houses, and a controversy has arisen how they should be rated. The company contend for what is called the mileage principle, which means that the houses shall be taken as one item in the whole concern, and that the aggregate rate shall be shared among the different municipalities according to the length of tramway in each. The city contend for what is called the parochial principle, by which separate buildings belonging to a single concern whose operations extend over a number of rating areas are rated separately to the area in which they stand.

It is obvious that the mileage principle may work unfairly as between the several areas. In this case it works to the disadvantage of Fitzroy, because the mileage within that city is about one-twelfth of the whole, whereas the value of the engine-houses within it is more than one-sixth of the value of all the engine-houses of the company. Madden C.J. lays it down that the parochial principle should be applied wherever reasonably practicable. Casey J. applied the mileage principle, for reasons not stated in the special case. The Supreme Court found in the case materials for applying the parochial principle, and saw no practical difficulty in doing it.

J. C.
1900
MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &c., OF THE CITY OF FITZROY.

What they have done is to deduct from the rating value of the whole concern the separate rating value of the engine-houses, which they have taken at the minimum fixed by statute for rating value, being 5 per cent. on the fee simple value. The remainder of the rating value of the concern they distribute among the rating areas on the mileage principle; and they allot to a separate area the rate leviable on the engine-houses within it. This appears to their Lordships to be the right method of dealing with the case.

There is yet another question which arises on the proceedings for obtaining leave to appeal. On October 4, 1899, the Supreme Court made an order which was corrected on December 21, 1899. It then took the form of a declaration that if within three months from October 4 security should be given by the company in a bond or mortgage or personal recognizance of the value of 400*l.* for the prosecution of an appeal and payment of all such costs as may be awarded to the respondents, the appeal shall be allowed.

On January 4, 1900, the Court passed an order which, after referring to certain bonds of the company and others, allowed the appeal. On February 1, 1900, the prothonotary certified the transcript, and further certified that the appellants had given security to the value of 400*l.* for the prosecution of the appeal and payment of costs. On February 9 the city of Fitzroy appealed from the order of January 4, and on the same day the Court passed an order by which, after declaring that the conditions prescribed by the Order in Council of June 9, 1860, had not been performed by the company, they discharged the order of January 4, 1900, and refused with costs the company's motion on which that order was made. This proceeding prevented the company from prosecuting their appeal except by special leave of the Queen in Council. That was obtained without difficulty, and at the same time the company asked and obtained leave to appeal from the order of February 9.

The conditions required by the Order in Council are as follows:—

"And in all cases security shall also be given by the party or

parties appellant in a bond or mortgage or personal recognizance not exceeding the value of 500*l.* sterling, for the prosecution of the appeal and the payment of all such costs as may be awarded by Her Majesty, her heirs and successors, or by the Judicial Committee of Her Majesty's Privy Council to the party or parties respondent, and if such last-mentioned security shall be entered into within three months from the date of such motion or petition for leave to appeal, then and not otherwise the said Court shall allow the appeal, and the party or parties appellant shall be at liberty to prosecute his, her, or their appeal."

What the appellant company did was to execute bonds in favour of the respondent city and to deposit them with the prothonotary. It also, though it was superfluous, deposited 400*l.* in court. The reasons for the order of February 9 are not stated in the record, but counsel agree that the objection to the company's proceedings was that the bonds were delivered to the prothonotary and not to the city. The validity of this objection has not been maintained by any argument at the bar. It seems to their Lordships to proceed on an erroneous construction of the Order in Council. That order requires security for payment of costs to the respondent, but does not require delivery to him of the bonds constituting his security. The Court's order as settled on December 21, 1899, correctly follows the Order in Council. If there is an effectual delivery of the instruments constituting the security, that is a compliance with both the orders. It is stated at the bar to be the common practice to deliver bonds to the prothonotary. The practice is probably very convenient, and certainly there is nothing at variance with it to be found in the Order in Council.

Their Lordships are of opinion that the order of February 9, 1900, should be discharged, and that instead thereof the appeal of the city from the order of January 4 should be dismissed with costs. They will humbly advise Her Majesty to make order to this effect, and with that exception to dismiss the present appeal. The appellant, having failed in every point on the merits of the controversy, must pay the general costs of

J. C.
1900
MELBOURNE TRAMWAY AND OMNIBUS COMPANY v. MAYOR, &c., OF THE CITY OF FITZROY.

the appeal. But as in consequence of the order of February 9, 1900, the appellant company was forced to make application to this Board, the respondents must pay the costs of that application, which will form a set-off against the general costs of appeal.

Solicitors for appellant: *Wadeson & Malleson.*

Solicitors for respondents: *Stanley, Woodhouse & Hedderwick.*

[HOUSE OF LORDS.]

THE MERSEY DOCKS AND HARBOUR BOARD . . . . . } APPELLANTS;

AND

THE ASSESSMENT COMMITTEE OF THE BIRKENHEAD UNION AND OTHERS . . . . . } RESPONDENTS.

H. L. (E.) 1901 April 25.

Poor-rate—Assessment—Net Annual Value—Rent of hypothetical Tenant—Evidence of Profits.

In estimating for the purposes of a poor-rate assessment the rent at which premises may be reasonably expected to let, the circumstances of the actual occupation are matters to be considered, including the receipts and expenses of the business carried on there; although (as in the case of the Mersey Docks and Harbour Board) the occupiers cannot make profits for their own benefit, but are required by statute to apply them to specific purposes.

The decision of the Court of Appeal, [1900] 1 Q. B. 143, affirmed.

UPON an appeal to quarter sessions against an assessment for the poor-rate the recorder of Birkenhead stated a case of which the parts material to this report are as follows: The assessment was in respect of the Woodside and Wallasey lairages on the Mersey, of which the appellants were owners and occupiers, the rateable values being fixed at 17,400*l.* and 4251*l.* respectively. The lairages are buildings of brick and wood, roofed partly with felt and partly with slate, used for the reception and slaughter of cattle and sheep brought from abroad, and for the cooling and preservation of the carcases. The premises are the only place in the neighbourhood at which foreign animals can be landed except under penalties as provided by the Diseases of Animals Act, 1894; but there are lairages for foreign animals at Deptford, Manchester, Hull, Cardiff, Bristol, Glasgow, and other places. The premises of the Woodside and Wallasey lairages are the part of the port of Liverpool defined as a foreign animals' wharf by an order

H. L. (E.) 1901

MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD ASSESSMENT COMMITTEE.

of the Board of Agriculture made January 4, 1896, in pursuance of the Diseases of Animals Act, 1894. The lairages were erected and are worked and carried on by the appellants under the provisions of their statutory powers, and not as a local authority under the Diseases of Animals Act, 1894. No local authority has been appointed under the Act in respect of the port of Liverpool. The lairages are carried on subject to the provisions of the Foreign Animals Order of 1896. The appellants under their statutory powers prescribed a schedule of charges in respect of the animals. In the course of the appeal the respondents tendered in evidence certain accounts, made up from the books of the appellants, shewing the receipts and expenditure of the appellants in the conduct of the business of the lairages for the three years ending July 1, 1896, and the averages thereof. The appellants objected, but the recorder admitted the evidence.

The recorder delivered the following judgment:—

"This is an appeal from the rate made on May 16, 1896, in respect of the lairages at Woodside and Wallasey which involves the determination of the amount at which those tenements ought to be assessed. The chief controversy between the parties in the appeal turns upon the principle applicable to the assessment of a tenement used for carrying on the business of a lairage, the valuations given in evidence with one or two exceptions not being made the subject of cross-examination by either side. The contention of the appellants is that the assessment should be based upon the structural value of the buildings plus the value of the land, as in the case for instance of an ordinary warehouse, whereas the respondents maintain that the assessment should be based upon the actual average receipts and expenditure in the conduct of the business of a lairage. I am of opinion that in the exceptional circumstances of this case it is not possible to ascertain what a tenant would give for the occupation of these tenements by merely considering the structural value of the buildings and the value of the land, or otherwise than by investigation of the actual average annual receipts and expenditure involved in carrying on the business of a lairage."

The Court of Appeal having required further information, the recorder added the following:—

"I did not assess the rate upon the profits of the tenant, but I used them together with other evidence to test the values given by the appellants and respondents respectively. Having taken into consideration all the evidence before me as to the actual receipts and expenditure of the occupiers who carried on the business, the nature of the business, and the chances of its permanence, the structural value of the buildings, the value of the land, and all the surrounding circumstances, I came to the conclusion that the gross values given by the respondents were too low, but I felt that I had no power in this appeal to put them up. I therefore accepted these values as the nearest to the true gross values I could arrive at, and proceeded to determine the amount of the deductions to be made therefrom in order to arrive at the net annual values by a consideration of the evidence before me, most of which was given by the appellants." He then found the following facts: "(1.) The tenements subject to assessment are capable of separate beneficial occupation apart from their connection with the rest of the appellants' property. (2.) Their value is enhanced by their proximity to and connection with the docks and rails belonging to the appellants. (3.) There are tenants other than the appellants available for the occupation of the tenements for the purpose of carrying on the business of a lairage. (4.) There are no similar tenements in this neighbourhood with which a comparison can be made. If the assessment ought to be based on the mere structural value of the buildings plus the value of the land and without reference to receipts and expenditure, I find as follows: Lairage in Woodside—gross estimated rental, 13,381*l.*; net annual value, 8964*l.* Lairage in Wallasey—gross estimated rental, 3728*l.*; net annual value, 2419*l.*

"The appellants admit that if the principle of assessment contended for by the respondents is correct, the gross estimated rentals of the two hereditaments in question appearing upon the rate-book are not too high, and the respondents admit that in this appeal they cannot be increased. Consequently I adopt these figures and find the true rateable value as follows:

H. L. (E.) 1901 MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD ASSESSMENT COMMITTEE.

Lairage in Woodside—gross estimated rental, 19,333*l.*; net annual value, 12,622. Lairage in Wallasey—gross estimated rental, 4723*l.*; net annual value, 3414*l.*

"The result is that as the net values are reduced the appeal is allowed, and the rate must be made upon the aforesaid net values of 12,622*l.* and 3414*l.*, instead of the figures 17,400*l.* and 4251*l.*"

The questions for the opinion of the Court were—(1.) Whether the accounts referred to were properly admitted. (2.) Whether the principle adopted in the aforesaid judgment is correct. If the answers to both the questions were in the affirmative, then the gross and rateable values as found by the court of quarter sessions were to stand.

The order of sessions was affirmed by the Divisional Court (Lawrance and Channell JJ.), and their decision was affirmed by the Court of Appeal (A. L. Smith, Collins and Vaughan Williams L.JJ.). (1)

Asquith, K.C., and *Marshall, K.C.* (*Horridge, K.C.*, with them), for the appellants. The appellants are statutory tenants of the lairages, and incapable of making for their own benefit a profit out of them: see *Mersey Docks* v. *Liverpool*. (2) Any profits, or any excess of receipts over expenditure, must be applied in the way fixed by statute. The appellants are also restricted by statutory conditions in the position of the premises and the management. There can be no competition for the tenancy, for the only other possible tenant would be a local authority under the Diseases of Animals Act, 1894, and that would be a substituted and not a competing authority. This being so, the true method is to arrive at a fair rent by allowing a just percentage upon the structural value of the buildings and land, the land being valued as it is with its facilities and advantages. There is no reason or authority for adding a sum in respect of profits which might be made if there were no restrictions, or in respect of the receipts and expenditure. The rate cannot be assessed on profits, nor upon the surplus of receipts over expenditure. As was said by Lord Herschell L.C.

(1) [1900] 1 Q. B. 143. (2) (1873) L. R. 9 Q. B. 84.

in *London County Council* v. *Erith* (1), this is not one of the class of cases where the amount of profit which can be earned is material in ascertaining the rate of assessment. The charges made under statutory powers do not enhance the value of the premises; they are imposed in respect of work done and services rendered. Profits which cannot be earned ought not to be taken into consideration: *Sculcoates Union* v. *Kingston-upon-Hull Dock Co.* (2) The Court of Appeal relied upon decisions where a distinction has been drawn between ordinary and exceptional cases, such as *Reg.* v. *Verrall* (3) and *Clark* v. *Fisherton-Angar* (4); but that distinction has been repudiated in this House: *Cartwright* v. *Sculcoates Union.* (5) There is no possible occupier of these premises who would find it worth his while to pay more than a rent based upon the structural value of the buildings and land, including the facilities.

[They also referred to *Jones* v. *Mersey Docks* (6); *Allison* v. *Monkwearmouth Shore* (7); *Mersey Docks and Harbour Board* v. *Birkenhead.* (8)]

Pickford, K.C., Tobin, and *R. M. Montgomery,* for the respondents, were not heard.

EARL OF HALSBURY L.C. My Lords, in this case it appears to me, for the reasons which have been given by the Court of Appeal, and having regard to the subsequent explanation of the learned recorder, that this appeal ought to be dismissed with costs.

I cannot help thinking that a great deal of the hesitation and confusion which has arisen upon the subject-matter which your Lordships have heard debated now on the part of the appellants has arisen from the advisory character of the judgments which have been given from time to time by the various Courts before whom this rating question has come. The thing that the Legislature has called upon the overseers to do is to solve a simple question of fact, and although it may be by no means simple as regards the mode in which they are to arrive at it,

(1) [1893] A. C. at p. 592.
(2) [1895] A. C. 136.
(3) (1875) 1 Q. B. D. 9.
(4) (1880) 6 Q. B. D. 139.
(5) [1900] A. C. at p. 159.
(6) (1865) 11 H. L. C. 443, 448.
(7) (1854) 4 E. & B. 13.
(8) (1873) L. R. 8 Q. B. 445.

H. L. (E.)
1901
MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD ASSESSMENT COMMITTEE.
Earl of Halsbury L.C.

the question of fact is simple enough as stated—that is to say, they are to make the rate "upon an estimate of the net annual value of the several hereditaments rated thereunto—that is to say, of the rent at which the same might reasonably be expected to let from year to year free of all usual tenant's rates and taxes and tithe commutation rent-charge, if any, and deducting therefrom the probable average cost of the repairs, insurance and other expenses, if any, necessary to maintain them in a state to command such rent." (1)

That is the proposition which is put before the parish officers—that is the question which they have to answer; and they are to arrive at that value, so far as I know, unfettered by any statute as to the way in which they can do it. I am not aware of any rule of law or any statute which has limited them as to the mode in which they shall arrive at it. It is not a question of law at all—it is a question of fact. These questions have from time to time come before the Courts, and have been argued as questions of law; but that is where, instead of doing what the statute has directed them to do, the overseers, or those who were acting on the part of the parish, have thought proper either to include something which by law ought not to be included, or to exclude something which ought to have been included. Of course in that sense, when you are dealing with a question of fact which has to be answered by any tribunal, it may be that a question may come up in the argument as a matter of law; but still one must bear in mind that the thing to be done is to answer a plain question of fact, namely, What is the rent which a tenant might reasonably be expected to give for the premises, subject to the deductions mentioned in the statute, as a tenant from year to year?

Now, my Lords, the first part of the proposition is that you are to rate—what? Not the tenant's trade. I will deal presently with some questions, and see how they arise with reference to whether you are entitled to go into the question of profit and loss. The trade is excluded from valuation by the terms of the statute. You are to rate the premises according to their value; therefore it would be very wrong indeed to rate

(1) The Parochial Assessment Act, 1836 (6 & 7 Will 4, c. 96), s. 1.

the trade, or to treat it as you would if you were dealing with the question for the income tax. You are not rating the income—you are rating the premises; so that where you have premises of a similar character with equal facilities for carrying on trade you have a very facile mode of coming to the conclusion what sum would reasonably be given by any tenant from year to year for such premises. But if, instead of doing that, you choose to go into elaborate calculations of how much the building cost to erect, and when erected what would be the value of it, you are only elaborating and making more complex and difficult the simple proposition which the Legislature has put before the overseers to answer.

My Lords, observations have from time to time been made by some learned judges saying that this should have been done or the other should not have been done in rating cases; but that was not as pronouncing judgment upon the law of evidence as to whether or not such and such a topic was legitimate or not in order to arrive at the conclusion which the Legislature had directed the overseers to arrive at, but merely indicating what was the ordinary and reasonable means of arriving at the conclusion at which they were bound to arrive.

My Lords, I am the more anxious to point this out because I think in these later days we have got rid of a good many of those sources of confusion which arose from the advisory character, as I have said, of the judgments given by various Courts—we have, I hope, got rid of the confusion arising from words being used not in the strict sense, but as matter of advice to the justices in determining such questions, and sometimes getting printed in the Law Reports as if they were decisions upon the law of evidence in this country. My Lords, I protest against any such view; and in this very case, although, as I said, during the last half-century we have arrived at conclusions which get rid of a great deal of the confusion that at one time existed, I find that one learned judge, Channell J., uses a phrase which I am afraid I cannot assent to, namely, that "wherever you can arrive at" the value "in that way which is the ordinary way"—that is, "by comparing it with other similar tenements"—"you are bound to arrive at it in that way."

H. L. (E.) 1901 MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD ASSESSMENT COMMITTEE. Earl of Halsbury L.C.

If that means that that is the facile and proper mode of doing it I should agree; but if it is laid down as a proposition of law that that is the only means by which it can be arrived at, I am bound to say I am not able to assent to that view.

Again, my Lords, I find that Collins L.J. says in the same way: "Hence the rule that in ordinary cases where the standard of rent is applicable evidence of actual profit made cannot be received. But it is equally true that where no such standard of comparison exists, it is legitimate to inquire into the profits actually earned." Again I am compelled to say that I cannot concur with the form in which that proposition is put. It is not a question of deciding what according to the law of evidence is receivable, but what is the natural and ordinary and usual mode by which you can answer the proposition put by the Legislature to the overseers.

My Lords, that proposition appears to me to be a very intelligible one if unclouded by all those questions which have from time to time been raised by ingenious persons, for a good many academic questions have been discussed at the expense of the parishes. What you are to find out is what a tenant will reasonably give, looking, surely, at all the circumstances of the particular occupation, including therein the business that has been done on the premises. I think I had occasion to say in a former case that it would be a very extraordinary thing if, although you can give evidence by expert testimony as to what kind of business might be done, you are not at liberty in point of law to ascertain what business has been done. It seems to me that no such proposition could reasonably be maintained. To go into the amounts of profits and losses as if you were finding out what a man's income is would be absolutely irrelevant; but for the purpose of ascertaining what a tenant would be likely to give, to suggest that that is something which in point of law you have no right to inquire into would be equally absurd. All the circumstances of the particular occupation, the mode in which the trade is being carried on, and the circumstances affecting either the restriction or the amplitude of the trade, are all legitimate subjects of inquiry, and the only question of law is whether the particular tribunal

has followed the line I have indicated or not. Surely those who are complaining of what has been done by the tribunal must establish either that something has been excluded from the calculation which by law ought to be included, or that something has been included which by law ought not to have been included. The question is a question of fact, and the only way in which you get in a question of law at all is with regard to the mode in which the question of fact has been dealt with.

Now upon that view, what is it that the learned recorder has done? I must take the recorder's own statement of what he has done, and how he has applied his mind to the topics which I have stated are legitimate, in order to answer the proposition to which he has been directed by the Legislature to apply his mind. The recorder says: "I did not assess the rate upon the profits of the tenant, but I used them together with other evidence to test the values given by the appellants and respondents respectively. Having taken into consideration all the evidence before me as to the actual receipts and expenditure of the occupiers who carried on the business—the nature of the business, and the chances of its permanence, the structural value of the buildings, the value of the land, and all the surrounding circumstances—I came to the conclusion that the gross values given by the respondents were too low, but I felt that I had no power in this appeal to put them up." In respect of that statement no question arises before your Lordships. "I therefore accepted these values as the nearest to the true gross values I could arrive at, and proceeded to determine the amount of the deductions to be made therefrom in order to arrive at the net annual values by a consideration of the evidence before me."

Now, my Lords, when we are dealing with it as a question of law, the limits to which I have pointed being whether in arriving at this conclusion of fact anything wrong has been done either by way of exclusion or inclusion, when I read that statement by the recorder, how is it possible to say that what the recorder has done here is wrong? What abstract proposition of law can be laid down to say that the recorder was

H. L. (E.) 1901 MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD ASSESSMENT COMMITTEE. Earl of Halsbury L.C.

wrong here? We have nothing to do with the question of amount. He may or may not have been wrong in the particular amount he has arrived at, but that is not a question of law. The question of law is whether upon this statement of fact you can say that he has included anything which he ought not to have included, or excluded something which he should have included. It seems to me that upon that statement of fact it is hopeless to contend that either of those propositions has been made out, and I therefore move your Lordships that this appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I also concur.

LORD DAVEY. My Lords, I am of the same opinion, and I only desire to say a very few words upon what I understood to be Mr. Asquith's argument in this case. I did not understand him to say as an abstract proposition that profits made from the use of a hereditament ought not to be taken into account generally, but he argued that they ought not to be taken into account in this particular case, because by statute the occupier of the hereditament was precluded from putting those profits, or the produce of the carrying on of the business on this hereditament, into his own pocket, and using them for his own advantage or as an enhancement of his own wealth, but was bound to apply those profits in the particular mode pointed out by the statute, in reducing debt and so on.

Now, my Lords, I think that argument is answered by the case which was decided in this House in the year 1865, *Jones* v. *Mersey Docks*. (1) In that case, although it is quite true that the question which was put to the learned judges by the House, and the question which was decided, was whether the hereditament was rateable at all, yet in answering that question ex necessitate the consideration of the question was involved upon what basis the rating should be. The argument used was that there was no beneficial

(1) 11 H. L. C. 443, 462, 501.

occupation, and it was held to be rateable because there was a beneficial occupation. I conceive that in principle, and impliedly (as I think has been held in subsequent cases which have come before the Courts), what was really decided was that notwithstanding the restriction upon the application of the profits resulting from carrying on that business on the hereditament, the profits so derived were a legitimate element in arriving at the value of the beneficial occupation which was to be the subject of rating. And, my Lords, if you will forgive me for trespassing upon your time, I will quote a passage in which I think that is put beyond controversy from a judgment of Blackburn J., as he then was, in advising the House on behalf of himself and the other learned judges. He says this: "Whichever may be the true mode of enunciating the proposition, it is clear that there can be no valid rate unless the occupation be such as to be of value; and if the words 'beneficial occupation' are to be understood as merely signifying that the occupation is of value (which is obviously the sense in which the phrase is used in many of the cases cited at the bar), it is clear that a beneficial occupation is essential as the foundation of the rate; but it is equally clear that, if the phrase is to be understood in this limited sense, the trustees have a beneficial occupation, for they actually occupy land as docks, and in virtue of that occupation receive payments from the shipping using the docks; at present greatly in excess of what is necessary to maintain the docks." Now every word of that is applicable to the lairages in which this business is carried on. "Hereafter," he continues, "the charges on shipping may be reduced so as greatly to diminish the revenue derived from this occupation; possibly at some future time to render it no greater than the sum requisite to maintain the docks; but whilst the dues on shipping are maintained at their present rate, it is clear that the hypothetical tenant would give for the occupancy of the docks, as at present enjoyed by the trustees, a rent greatly in excess of what would be necessary to maintain the docks in a state to command that rent." And Lord Westbury, in moving the judgment of the House, after referring to the Parochial Assessment Act, which he quotes as

H. L. (E.) 1901 MERSEY DOCKS AND HARBOUR BOARD v. BIRKENHEAD ASSESSMENT COMMITTEE. Lord Davey.

saying that "occupation to be rateable must be of property yielding or capable of yielding a net annual value," and so forth, continues: "It is in this sense that I understand the words 'beneficial occupation,' wherever it is said that to support a rate the occupation must be a beneficial one. For on principle, it is by no means necessary that the occupation should be beneficial to the occupiers." In other words, it is perfectly immaterial what becomes of the amount which is the result of carrying on the business on the hereditament after paying the expenses and other outgoings. It is immaterial whether it is applied for public uses, or the payment of debt and other charges as in the present case, or whether it goes into the pockets of the occupiers. What you have to look at is this: Is the occupation "beneficial" in the sense in which the term is used in that passage? I admit that the question then before the House was not upon what principle should the rate be made, but the principles there laid down appear to me to be equally applicable to this case which is now before your Lordships; and, as it humbly appears to me, that is a complete answer to the argument which Mr. Asquith addressed to us.

LORD ROBERTSON. My Lords, I agree to what has been said by the Lord Chancellor, and by my noble and learned friend Lord Davey.

LORD LINDLEY. So do I, and I cannot usefully add anything.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, April 25, 1901.

Solicitors: *Rowcliffes, Rawle & Co., for W. C. Thorne, Liverpool; J. E. & H. Scott, for Thompson, Hughes & Mathison, Birkenhead.*

[HOUSE OF LORDS.]

KINGSBURY . . . . . APPELLANT;

AND

WALTER AND OTHERS . . . . . RESPONDENTS.

H. L. (E.) 1901 April 29.

Will—Construction—Gift to a Class—Gift to "A. and the Children of B."—Death of A. in Testator's Lifetime—Intention of Testator.

A testator appointed "his wife and his niece A." executrixes, and gave them property in trust for his wife (who survived him) for life, and after her death for "A. and the child or children of his sister B. who should attain the age of twenty-one years equally to be divided among them as tenants in common." At the date of the will A. was nearly twenty-one; she died in the testator's lifetime. At the death of the tenant for life B.'s children had attained twenty-one:—

Held, that the bequest to A. did not lapse, since upon the true construction of this particular will the testator's intention appeared to be to make one class of nephews and nieces, so that if any of them died in his lifetime the survivors should take.

The construction of gifts to a class discussed.

The decision of the Court of Appeal, [1899] 2 Ch. 314, affirmed.

WALTER MOSS, by his will made in 1876, appointed his wife and his "niece, Elizabeth Jane Fowler," executrixes. He gave all his share in the *Daily Telegraph* newspaper to his wife and Elizabeth Jane Fowler, upon trust to pay the income to his wife for her life "and after her decease upon trust for the said Elizabeth Jane Fowler and the child or children of my sister Emily Walter who should attain the age of twenty-one years equally to be divided among them as tenants in common," and bequeathed the residue of his estate to his wife. Other references in the will to Elizabeth Jane Fowler are mentioned in Lord Davey's judgment. Elizabeth Jane Fowler was at the date of the will nearly twenty-one. She died in 1891. The testator died in 1893. His widow died in 1897. Emily Walter's five children had all attained twenty-one when the testator's widow died.

The appellant was executor and residuary legatee under the will of the testator's widow, and claimed the share of Elizabeth

H. L. (E.) 1901 KINGSBURY v. WALTER.

Jane Fowler under the bequest in the testator's will as a legacy which lapsed by her death during the testator's life and fell into the residue of his estate. Upon an originating summons to determine the question North J. so held.

The Court of Appeal (Lindley M.R., Sir F. H. Jeune, and Romer L.J.) reversed this decision, and held that the bequest in the testator's will was to be treated as a gift to a class, and that the share bequeathed to Elizabeth Jane Fowler did not lapse by her death in the testator's lifetime and did not fall into the residue of his estate. (1) North J., Lindley M.R., and Sir F. H. Jeune considered the authorities confusing and contradictory.

April 26, 29. *Vernon Smith, K.C.*, and *Ball*, for the appellant, contended that the bequest was a gift to a class, and in addition to the cases cited in the Court below and in Lord Davey's judgment referred to *Shaw* v. *MacMahon* (2); *In re Featherstone's Trusts*. (3)

Swinfen Eady, K.C., H. Terrell, K.C., and *Fawcus*, for the respondents, were not heard.

Hatfield Green, for Emily Walter, trustee.

EARL OF HALSBURY L.C. My Lords, I think the learned argument we have heard from both the learned counsel has reduced the question to be decided by your Lordships to a very narrow one, and I am not disposed to indulge in general abstract propositions, partly for the reason which was given by Romer L.J. below, and partly because I confess I regard with great jealousy, when you are construing a particular will, any unnecessary observations upon questions of abstract propositions which are likely, do what you will in order to apply your observations to the particular will, to be quoted afterwards as applicable to a different will made by a different person using different language under totally different circumstances from those of the will to which you applied them. Rightly or wrongly, certain canons of construction have been

(1) [1899] 2 Ch. 314. (2) (1843) 4 Dr. & W. 431.
(3) (1882) 22 Ch. D. 111.

acted upon for so long that I think it would be impossible now to disregard them, partly upon the ground that it is to be assumed—whether the assumption is well founded or not I do not stop to inquire—that lawyers draw instruments with reference to the known state of the law, and the known state of the law is supposed to include those canons of construction which from time to time have been adopted by the Courts in the construction of wills. Therefore, my Lords, I do not propose to pause to inquire into the origin of the distinction between a class gift and a gift to an individual. It is enough to say that it is clearly established, I think, that where the question is between, on the one hand, lapse, and, on the other hand, the division of a particular property between different members of a class, there must in the latter case be something which the Court upon construction determines to be a "class," and the question is, how is that to be ascertained?

Now, my Lords, applying myself to this will, it is of course legitimate to consider the circumstances, because one has to place oneself in the position filled by the testator at the time of making his will. Applying myself to those circumstances, and considering the language used, I find that the testator gives this particular property which he designates (to use Romer L.J.'s phrase, "property X.") to a niece who was approaching twenty-one years of age, and to the children of another sister who should attain twenty-one, and who also would fulfil the condition of being nieces. It is said that this was not a class; but it is admitted that if he had said, "To all my nephews and nieces," that would have been a class. It would have indicated the reason why he had selected that particular body of persons among whom he intended the property X. to be divided. But it is argued that it is not a class here because, although he has described persons who in fact are a class, yet he has not said that they are a class, nor has he used the word "class," or words shewing that, as lawyers would say, they fulfilled the conditions of a class. My Lords, I confess that would be, to my mind, frittering away the substance of the gift by looking merely at the exact words in which it is conveyed. The person in respect of whom

H. L. (E.) 1901 KINGSBURY v. WALTER. Earl of Halsbury L.C.

the question arises, Elizabeth Jane Fowler, who died before the testator died, was a niece. He had so described her in the earlier part of the will, and, if I were to speculate what his intentions were, I should say his intentions were that his nephews and nieces were to be the objects of his bounty as regards this particular property. It is not denied that if those words "nephews and nieces" had been used—if instead of using language expressing the gift to the individual and those who formed the rest of the body he had described them as what they in fact were, his "nieces"—it would have been a class gift. The sole question upon this instrument—and I am confining myself to what this instrument discloses—is whether, because he has not used one phrase rather than another, you are to alter the substance of the gift. My Lords, I decline to do that. I think that, construing Romer L.J.'s language as I do construe it, what he meant to convey was reconcilable with the decided cases. Unfortunately, the cases have been "complicated" and confused, or likely to be confused—I do not say absolutely confused after what my noble and learned friend Lord Davey has said; but it is certainly a misfortune, in such a matter as the construction of wills, to do anything which may add to any confusion which may exist. If I rightly construe what Romer L.J. says, what he meant was that there is a class properly so called, although it is not so described in words. You may take the situation of the family, the condition of things which in fact existed at the time when the testator composed his will, as being equivalent to that which would be the description of a class; and it is not denied that if it was a description of a class, the result which the respondents contend for would be arrived at.

For these reasons I am of opinion that this appeal ought to be dismissed, and the judgment of the Court of Appeal affirmed.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

There may be, perhaps, some difficulty in reconciling all the authorities, although I do not think that they are so much in conflict as the learned judges in the Court of Appeal seem to

have thought. I do not think it is to be wondered at that there is a sort of conflict between particular cases, because some lie so near the line that they might have been decided either way without violating any principle; and besides, I cannot help thinking that judges have at times concerned themselves more about the definition of "a class," about what is or what is not a "class," than about the language of the testator actually before them.

In my opinion the principle is clear enough. When there is a gift to a number of persons who are united or connected by some common tie, and you can see that the testator was looking to the body as a whole rather than to the members constituting the body as individuals, and so you can see that he intended that if one or more of that body died in his lifetime the survivors should take the gift between them, there is nothing to prevent your giving effect to the wishes of the testator.

I think this is a gift to a class. The condition attached to the gift to the children of Emily Walter was treated as fulfilled or supposed to be fulfilled in the case of the niece whom the testator first mentions. He treated her as a person grown up—he made her trustee and executrix. I do not think there is anything in that suggested difficulty whatever. I think it is pretty plain that the testator made one class of all his nephews and nieces, and intended that if any of them died in his lifetime the survivors should take.

LORD SHAND. My Lords, I am of the same opinion.

LORD DAVEY. My Lords, I am of the same opinion, but, while agreeing with the conclusion of the Court of Appeal, I cannot say that I regard the reasons given by the learned judges in that Court as altogether satisfactory. The then Master of the Rolls expressed himself to the effect that if he had been deciding this case in the first instance he would have given the same decision as North J., but that he had been convinced by the arguments which had been used by Romer L.J. I shall have a word to say presently as to the propositions laid

H. L. (E.) 1901

KINGSBURY v. WALTER.

Lord Davey.

down by Romer L.J., which I think are not consistent either with authority or principle.

My Lords, I am not prepared to agree with the learned judges in the Court below that the cases are in such inextricable confusion, or so contradictory or "complicated" as they seem to have thought, and I am of opinion that this case may be decided without infringing the authority of any of the cases to which Mr. Vernon Smith and his learned junior have drawn our attention.

The question, I agree, is whether a gift in this case to "Elizabeth Jane Fowler and the children of my sister Emily Walter" is what is called, by an expression well known in our law, a class gift. Primâ facie a class gift is a gift to a class, consisting of persons who are included and comprehended under some general description and bear a certain relation to the testator. That definition is in accordance with that given by Lord Selborne in the case referred to in North J.'s judgment, *Pearks* v. *Moseley* (1), and by Lord Hatherley, then Wood V.-C., in a case which has also been referred to at the bar, *In re Chaplin's Trusts*. (2) But it may be none the less a class because some of the individuals of the class are named. For example, if a gift is made "to all my nephews and nieces including A.," or if a gift is made "to C. and all other my nephews and nieces," each of those would be a class gift. *Stanhope's Case* (3) is an example: there the gift was to four named daughters and all his after-born daughters, and that was rightly, as I think, held to be a class gift. To the same effect is a case before Chitty J., *In re Jackson* (4), where the gift was to five named individuals and all his other sons and daughters who should be born afterwards and attain the age of twenty-one years. Chitty J. held that that was a class gift, although the condition of attaining the age of twenty-one years was imposed upon the other children and not upon those who were named. He came to this conclusion upon the ground that it appeared from the evidence that those who were named had already attained the age of twenty-one years. That case

(1) (1880) 5 App. Cas. 714.
(2) (1863) 33 L. J. (Ch.) 183.
(3) (1859) 27 Beav. 201.
(4) (1883) 25 Ch. D. 162.

seems to me to have a considerable bearing upon the case now before the House.

There may also be a composite class, such as, for instance, children of A. and children of B.: that would be a good class. On the other hand, a gift to A. and all the children of B. is, in my opinion, primâ facie not a class gift, and I think that has been so decided, and rightly decided, in the case *In re Chaplin's Trusts* (1), which I have already referred to, and also in a case before Sir George Jessel of *In re Allen, Wilson* v. *Atter*. (2) There was in that case a direction "to divide equally amongst all the children of R. W., the child of W. W. and L. his wife, and A. W., the widow of J. W., share and share alike." It was held that this was not a gift to a class and that the share lapsed. I need not read the learned judge's judgment because it was read in the course of the argument, and it is present to your Lordships' minds.

My Lords, I think those cases were rightly decided, and I do not agree with the proposition which I understand to be laid down by Romer L.J., who says: "In my opinion it is correct to say that a gift by will to a class properly so called, and a named individual such as A. equally, so that the testator contemplates A. taking the same share that each member of the class will take, is primâ facie a gift to a class." I think that that is contrary to the established authorities and to the principles applicable to this branch of the law.

But, my Lords, it is perfectly plain that a gift in the form which I have mentioned may be a class gift, if there is to be found in the will a context which will shew that the testator intended it to be a class gift. I think the same result may be arrived at if the Court, putting itself into the same position as the testator occupied, with the same knowledge as the testator had when he was writing his will, comes to the conclusion that the gift, although expressed in the form of a gift to an individual and the children of A., was intended to operate as a class gift. There is abundant authority for that proposition. I will only mention two cases, before Lord Romilly. The case

(1) 33 L. J. (Ch.) 183. (2) (1881) 29 W. R. 480; 44 L. T.(N.S.) 240.

H. L. (E.) 1901 KINGSBURY v. WALTER. Lord Davey.

of *Aspinall* v. *Duckworth* (1) appears to me to be exactly this case. It was a gift unto and equally amongst the testator's nephew A. and the children of his sister B. as tenants in common. Lord Romilly held that that was a gift to a class. It differs from this case only in one particular, namely, that the gift here is confined to those children who attain twenty-one.

My Lords, another principle which is, I think, established in this branch of the law is, that all the interests of members of the class must vest in interest at the same time. For instance, if there is a gift to A. for life and afterwards to B. and the children of C., the class must vest in interest at the death of the testator, although it is capable of enlargement by the birth of subsequent children of C. during the lifetime of the tenant for life. My Lords, it is, I conceive, on that ground that the other case to which I referred, namely, *Drakeford* v. *Drakeford* (2), was decided. The learned judge, Lord Romilly, there said that the gift which he had before him in that case was not a class gift. It was in this form—a gift to A. for life, and at his death to be equally divided between his surviving children and the testator's niece Rosamond Willows. There, as your Lordships see, only those children who survived the tenant for life would have taken, whereas Rosamond Willows' interest would have become vested at the testator's death. On that ground Lord Romilly held that it was not a class. He says: "I have no doubt that if there be a gift to the children of A., and to my niece Rosamond, and to my niece Mary, and so on, that may be a class. But to make this one class it must be to this effect: 'I leave the whole of my funded property to my brother for his life, and at his death the property to be equally divided amongst his children and my niece Rosamond Willows, or such of them as shall survive the tenant for life' "—making them all vested interests at the same time. "In all these cases," he says, "the class would be ascertained at a particular period, and if one died there would be no lapse. But here Rosamond Willows is to take her share at all events; it is given absolutely to her, and the

(1) (1866) 35 Beav. 307. (2) (1863) 33 Beav. 43, 48.

only persons to be ascertained are the children of the brother, and they are to be ascertained at his death"—not at the testator's death. That appears to me to have been the ratio decidendi of that case, and being so it does not appear to me to be in conflict with the other decisions of that learned judge.

Now, my Lords, in this case it is a gift to Elizabeth Jane Fowler and the children of Mrs. Walter who shall attain the age of twenty-one years as tenants in common. It may be said, therefore, that in this case the gift to Elizabeth Jane Fowler was absolute whether she had attained the age of twenty-one years at the testator's death or not, whereas the gift to the children of Mrs. Walter would not vest in them until they attained the age of twenty-one. If it stood upon that bare fact alone, I should have been of opinion that North J.'s decision was right. But, my Lords, we have to look at the context, and, reading the whole of the will, I find that although Elizabeth Jane Fowler is not described as a niece in the gift itself, still in the previous part of the will the testator had appointed his "niece Elizabeth Jane Fowler" together with his wife executrix of his will, and he afterwards describes her as his "niece," and gives to her after his wife's death a messuage or tenement under the description of "my niece Elizabeth Jane Fowler." He also appoints her trustee of his will for various purposes. Elizabeth Jane Fowler was not indeed twenty-one years of age, but she was within a few months of attaining that age; and I think the testator treated her for the purpose of his will as if she had attained that age. In this respect it nearly resembles the case before Chitty J.

I do not at all deny that the case is very near the line; but I think there is enough in this will itself to shew that he gave the property to her as a niece, and that he makes a special class of nieces and nephews consisting of the only child of Mrs. Fowler and the children of his sister Mrs. Walter, and that it was intended to be a class gift to that special class, and I should so construe the will.

LORD BRAMPTON. My Lords, I am entirely of the same opinion.

H. L. (E.) 1901 KINGSBURY v. WALTER.

LORD ROBERTSON. My Lords, I agree, holding that the just construction of this bequest, when read in the light of the facts as to the state of the family, is that it was intended as a gift to the nephews and nieces of the testator.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, April 29, 1901.

Solicitors: *Tilleards*; *V. I. Chamberlain.*

[HOUSE OF LORDS.]

H. L. (E.) 1901 *May* 2.

BULLIVANT AND OTHERS . . . . . APPELLANTS;

AND

THE ATTORNEY-GENERAL FOR VICTORIA (ON BEHALF OF HER MAJESTY) . . . . . RESPONDENT.

Practice—Discovery—Production of Documents—Privilege—Communications between Solicitor and Client—"Evasion" of Statute.

An information against executors claimed duties under a Colonial statute, alleging that the defendants' testator had some time before his death executed voluntary conveyances of Colonial property "with intent to evade the payment of duty" under the statute. One of the defendants, a member of the firm of solicitors whom the testator had instructed to prepare the conveyances, was ordered to produce the notes and records of these instructions, but objected to do so on the ground that they were privileged communications between solicitor and client for the purpose of obtaining advice:—

Held, first, that the privilege was not lost by the death of the testator; and secondly, that the word "evade" was ambiguous and capable of two meanings, one a perfectly innocent one, and that, without expressing any opinion as to the meaning in which it was used in the statute, there was no proof or even allegation of any fraud or illegality to displace the privilege.

The decision of the Court of Appeal, [1900] 2 Q. B. 163, reversed.

AN information filed in the Supreme Court of Victoria by the Attorney-General for Victoria on behalf of Her late

Majesty Queen Victoria against the appellants alleged that James Austin (deceased) was in 1894 and 1895 possessed of estates in Victoria, and did in November, 1894, and March, 1895, execute several wholly voluntary conveyances of those estates to certain persons (some of whom were appellants) upon certain trusts "with intent to evade the payment of duty" under a Colonial statute, the Administration and Probate Act, 1890 (54 Vict. No. MLX.). That James Austin died in May, 1896, having appointed three of the appellants executors of his will which they had proved. The other appellant was a trustee and beneficiary under some of the conveyances. The information claimed from all the appellants various sums, amounting in all to 20,000*l*., for duty payable under the above Act.

The appellants in their defence denied (inter alia) that the conveyances were wholly voluntary and that they were executed with intent to evade the payment of duty under the statute. The Attorney-General joined issue thereon.

An order of the Supreme Court of Victoria having been made under 22 Vict. c. 20, for a commission to examine witnesses in England, the appellant Stanley Austin (inter alios) attended the commissioners. He was a solicitor in Glastonbury, a son of the testator, one of the executors and a trustee under some of the conveyances. He admitted that the conveyances were settlements made for the benefit of himself and his brothers and sisters, and prepared by the late firm, Bath & Austin, of which he had been a member, and that he had in his possession a diary kept by his former partner, Bath, now deceased, and other documents which contained entries of instructions given by the testator to Mr. Bath with respect to these conveyances, but objected to produce them on the ground that they were held by him and his present partner as solicitors and successors to the testator's late solicitor, and that they contained entries of professional and confidential communications for the purpose of obtaining legal advice.

Mathew J. made an order that Stanley Austin should attend before the commissioners and produce the journals, day-books, or other records kept by the late firm of the instructions given

H. L. (E.) 1901 BULLIVANT v. ATTORNEY-GENERAL FOR VICTORIA.

to them by the testator with reference to the preparation, execution, or carrying into effect of the conveyances, and this order was affirmed by the Court of Appeal. (1) The defendants appealed.

By s. 115 of the Administration and Probate Act of Victoria, 1890 (54 Vict. No. MLX.), "If any person has made or shall hereafter make any conveyance or assignment, gift, delivery or transfer of any estate real or personal, or of any money or securities for money, with intent to evade the payment of duty under this part of this Act, in case such person should die the property comprised in any such conveyance or assignment, or the subject-matter of any such gift, delivery or transfer, shall upon the death of such person be deemed to form part of his estate for the purposes of this part of this Act upon which duty shall be payable under this part of this Act, and the payment of the duty upon the value of such property may be enforced against such property in the same way as duty under this part of this Act is enforceable, and as if such person had bequeathed or devised the said property to the person to whom the same may have been conveyed assigned given delivered or transferred. Any conveyance or assignment, gift, delivery or transfer of any estate real or personal, or of any money or securities for money, already made or which hereafter may be made either in escrow or otherwise to take effect upon the death of the person making the same, shall be deemed to have been or to be made as the case may be with intent to evade the payment of the duty under this part of this Act. All property of any kind whatsoever the subject-matter of a donatio mortis causâ shall upon the death of the person making such donatio mortis causâ be deemed to form part of his property for the purpose of estimating the duty payable under this part of this Act, and duty shall be paid upon it as upon any other part of such person's property, and the payment of such duty may be enforced against such property the subject-matter of such donatio mortis causâ in the same way as against any other property of or to which such person may die seised possessed or entitled."

(1) [1900] 2 Q. B. 163.

April 30; May 2. *Sir R. T. Reid, K.C.*, and *Upjohn, K.C.* (*E. M. Pollock* with them), for the appellants. The privilege claimed is for confidential communications which passed between solicitor and client to enable the client to obtain professional advice as to his property and his rights thereto. The Court of Appeal held that the privilege does not exist if the client consulted the solicitor how to "evade" the payment of duty under a statute. This assumes that "evade" means avoid by fraud, stratagem, trick, or underhand contrivance. But evade has two meanings: evade lawfully, and evade unlawfully. A man may evade a tax or duty by not doing the act which makes the impost applicable, and he may consult his solicitor how to avoid doing the act: such communications are privileged. The judgment of the Privy Council in *Simms* v. *Registrar of Probates* (1) pointed out that the word "evade" was capable of two senses—one which suggests underhand dealing, and another which means nothing more than the intentional avoidance of something disagreeable. Their Lordships held that in the absence of evidence of some device or underhand contrivance the words "with intent to evade the payment of duty" contained in an Australian statute imposed no penalty, not being applicable to innocent transactions. In the present case there is no allegation or suggestion of fraud or illegality: the information alleges merely an intent to evade in the words of the statute, which is quite consistent with an innocent transaction. The respondent will rely on *In re Postlethwaite* (2) and *Reg.* v. *Cox and Railton* (3); but the first was a case of fraud and the second of a criminal purpose. In *Follett* v. *Jeffereys* (4) the privilege was maintained, as though fraud was alleged it was not made out. A mere allegation of fraud is not sufficient: there must be a case made out by evidence or admission; otherwise a party might always require privileged communications to be disclosed by merely alleging fraud or illegality. There is no decision in favour of such a practice. In *Williams* v. *Quebrada Ry. &c. Co.* (5) Kekewich J.

(1) [1900] A. C. 323.
(2) (1887) 35 Ch. D. 722.
(3) (1884) 14 Q. B. D. 153.
(4) (1850) 1 Sim. (N.S.) 1.
(5) [1895] 2 Ch. 751.

H. L. (E.) 1901

BULLIVANT v. ATTORNEY-GENERAL FOR VICTORIA.

saw the communications with the consent of the defendants' counsel.

[They also referred to *Gartside* v. *Outram* (1) and *Minet* v. *Morgan*. (2)]

Haldane, K.C., and *Rowlatt*, for the respondent. The answer to the claim of privilege is twofold. First, the testator with whom the communications took place is dead, and the privilege does not survive for the benefit of his executors or trustees or others: *Russell* v. *Jackson*. (3) Secondly, the privilege does not exist where there is fraud, illegality, or evasion of a statute. Turner V.-C. in that case laid down broad principles, and said it was no part "of the duty of a solicitor to advise his client as to the means of evading the law." The information contains a distinct allegation of an intent to evade the payment of duty under the Act, and that allegation must be taken for the present purpose to be true. It is not denied that the communications of which discovery is sought are relevant to that allegation.

[They also referred to *Gresley* v. *Mousley* (4) and the cases cited in the Court below.]

Sir R. T. Reid, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, it appears to me that the judgment appealed from ought to be reversed. I do not think it would be desirable to express any opinion with reference to the true construction of the Victorian statute beyond this: We are not here upon the question of sufficiency of pleading at all. I think it is fallacious to suppose that we are to ascertain for the purpose of this inquiry whether or not the pleadings do mean or do not mean one or the other of the two different sets of meanings which have been attributed to them.

I think the broad propositions may be very simply stated: for the perfect administration of justice, and for the protection of the confidence which exists between a solicitor and his client, it has been established as a principle of public policy

(1) (1857) 26 L. J. (N.S.) (Ch.) 113.
(2) (1873) L. R. 8 Ch. 361.
(3) (1851) 9 Hare, 387, 392.
(4) (1856) 2 K. & J. 288.

that those confidential communications shall not be subject to production. But to that, of course, this limitation has been put, and justly put, that no Court can be called upon to protect communications which are in themselves parts of a criminal or unlawful proceeding. Those are the two principles, and of course it would be possible to make both propositions absurd, as is very often the case with all propositions, by taking extreme cases on either side. If you are to say, "I will not say what these communications are because until you have actually proved me guilty of a crime they may be privileged as confidential," the result would be that they could never be produced at all, because until the whole thing is over you cannot have the proof of guilt. On the other hand, if it is sufficient for the party demanding the production to say, as a mere surmise or conjecture, that the thing which he is so endeavouring to inquire into may have been illegal or not, the privilege in all cases disappears at once. The line which the Courts have hitherto taken, and I hope will preserve, is this—that in order to displace the primâ facie right of silence by a witness who has been put in the relation of professional confidence with his client, before that confidence can be broken you must have some definite charge either by way of allegation or affidavit or what not. I do not at present go into the modes by which that can be made out, but there must be some definite charge of something which displaces the privilege.

Now, my Lords, when I look at all that is to be found here, I find no such definite charge at all. If, for the purpose of evading the payment of duty to which the man was liable, he entered into some secret and covinous arrangement whereby, although he should still retain the property during his lifetime, nevertheless colourable deeds should be executed which would shew that the property was not liable to duty, that would undoubtedly be a fraud, and I should think there would be no doubt that a person who was engaged in such a transaction could be compelled either to produce the correspondence or to state the conversation shewing how that alleged fraud was intended to be carried out. But there is no such allegation—

H. L. (E.) 1901 BULLIVANT v. ATTORNEY-GENERAL FOR VICTORIA. Earl of Halsbury L.C.

there is nothing here which any Court can regard as an allegation of fact sufficient to displace the privilege. If the fact were merely that the person did execute voluntary deeds the effect whereof was that the tax never fell upon the property at all, I do not know that there is any offence in that either in Victoria or in this country. People are not bound to continue in the same condition of things, either as regards their direct or indirect taxation, which will render either the consumption of articles in the one case or the property they have in the other always liable to the tax, and I decline to believe that the Colony has made such an enactment until it is established that that is the enactment which they have made.

My Lords, in the parallel, but not exactly similar, case in the Privy Council where the word "evade" was used, the Privy Council held (I myself was a party to that judgment) that it must be understood that where it was intended to be an allegation that a fraud had been committed you must allege it and prove it, and that it was no fraud for a man to make a voluntary conveyance of his estates, not having any secret trust, and not having any arrangement whereby the deed could say one thing and the voluntary arrangement mean another; that the fact that he did intend to make a gift during his lifetime was no offence and no breach of the Act of Parliament, and nothing that could be considered tainted with the character of fraud: *Simms* v. *Registrar of Probates*. (1) That being so, my Lords, it appears to me that it would be an abandonment of the principle which has been held sacred in this country if, when a person has done that which in itself may be innocent, you should simply, because you choose to suggest that it was done with the view of evading the payment of a tax, require the witness to disclose the whole of his affairs, and enable the private communications between himself and his solicitor to be displayed to the Court.

I cannot help thinking that if this question had arisen in the ordinary course the error would not have been committed which has been committed; but we have got into a somewhat artificial condition of things by the method in which we are endeavouring

(1) [1900] A. C. 323.

to apply the procedure here, which would be a proceeding in open Court. Here there is a commission, and to fortify such commission a statute has been passed for the purpose of giving the judges in this country a power to enforce the attendance of witnesses just as if the cause of action had arisen in this country. If you construe the statute, bearing its object in mind, it is simple enough. The statute was passed for the purpose of assimilating the administration of justice all over Her Majesty's dominions. What you would have to do when you got to trial and the privilege was pleaded would be this: the judge would have to satisfy himself whether there was really established to his satisfaction a charge of fraud or something that would displace the privilege—I do not say prove it—but it would be a reasonable and proper thing under the circumstances to establish the proposition that the issue to be tried was whether there was really a fraud or not, and that this was a piece of evidence relevant to establish the fraud. In this case it is obvious nobody can suggest there is any evidence of it, and, as it appears to me, no allegation of it, and, upon the broad proposition that there is neither proof nor allegation, nor anything which would displace the privilege, it appears to me that the orders made in this case were wrong, and that your Lordships ought to reverse them.

LORD SHAND. I agree that there is no averment of fraud or of illegality, having regard to the decision of the Privy Council in *Simms' Case*. (1) The statement is merely that the deeds in question were granted to "evade" payment of death duty due, using the word which occurs in the statute. If that term merely means to "avoid" the duty, as was held in *Simms' Case* (1), then there is here no averment of fraudulent contrivance, or indeed of any illegal proceeding, and in the absence of this I agree that the alleged privilege fails.

LORD DAVEY. My Lords, I am of the same opinion.

I do not dissent from what was said by Mr. Haldane, that it must be assumed for the present purpose that the case

(1) [1900] A. C. 323.

H. L. (E.) 1901 BULLIVANT v. ATTORNEY-GENERAL FOR VICTORIA. Lord Davey.

stated in the pleadings is true for the purpose of testing the right to production. But that renders it, of course, of extreme importance to see what is stated in the pleadings, and what are the issues upon which the trial is now presumed to be proceeding. I also agree with what was said by Sir Robert Reid, that if a man in his pleading, whether he be the Attorney-General or anybody else, merely sets out a sentence from a statute which is capable of two meanings without saying which he means, the one being consistent with the absolute innocence of the transaction and the other meaning involving a charge of either fraud or illegality, he must say which he means, and if he intends to charge illegality, he must state facts for the purpose of shewing what the illegality is. But, my Lords, this is not a question of pleadings as between the parties. What we have to see is whether a witness who is called upon to produce privileged documents is bound to produce them or not, and for that purpose only we must look to see what are the issues which are raised by the pleadings.

Now, my Lords, the information states only certain voluntary deeds, and then contains an allegation that these voluntary deeds were executed for the purpose of evading payment of certain death duties which are imposed upon property passing upon the death of the testator. The words in the section under which it is sought to say that it was an illegal transaction are these: "If any person has made, or shall hereafter make, any conveyance," and so forth, "with intent to evade the payment of duty under this part of the Act." If the duty never attached, if there is no section of the Act which imposes a duty upon voluntary inter vivos transactions, I cannot see how a person who is a party to such a transaction can be said to do it with intent to evade payment of a duty which the Act does not impose upon the transaction itself. My Lords, I do not mean to give any definite opinion upon the construction of this clause. But I do think that if it be meant that the executing of these voluntary conveyances which, upon the face of them, purport to be a parting by the testator with the property comprised in them out and out, a parting with the whole jus disponendi of it so that it would become no longer his

property, but the property of somebody else, and would be the property of somebody else at his death—if it be meant to say that the executing of those conveyances was an illegal transaction, some particulars of the illegality should be stated; and merely to quote the words of the statute to which I have already referred is not stating such a case of fraud or illegality, or raising such an issue for trial between the parties as would enable the plaintiff to call upon a witness to produce documents which would otherwise be privileged from production.

My Lords, I think the fallacy of the Court of Appeal, if I may respectfully say so, is in treating the statute as if it made the execution of voluntary deeds with or without the intention to put property in such a position as not to incur liability to the tax as being an improper or an illegal act. In my opinion, it is nothing of the kind. It is a perfectly legal act, and there is nothing upon this information which to my mind clearly states any such case of illegality as would overrule the privilege on the part of a witness.

LORD BRAMPTON. My Lords, I entirely concur.

LORD LINDLEY. My Lords, I also concur; but I will add a few words out of respect to the learned Lords Justices from whom I differ.

The question arises in this way. In May, 1896, a gentleman died, and under the Colonial law his estate had to pay certain duty. Some time before he died he executed some voluntary conveyances, and it is said that under the law of the Colony the property comprised in those voluntary conveyances was subject to duty. In order to obtain evidence about those documents, a commission was sent over here, and under the statute to which reference has been made, 22 Vict. c. 20, witnesses were called before that commission, and we have to consider the matter from the point of view of an action or information in this country raising certain definite issues in support of which witnesses were called and examined. When the witnesses were called they were asked to produce these documents,

H. L. (E.) 1901 BULLIVANT v. ATTORNEY-GENERAL FOR VICTORIA. Lord Lindley.

and above all the instructions given to the solicitor who prepared them. The answer was at once set up by the witnesses, "Those are privileged documents," the privilege being founded upon the ordinary professional confidence which has been held in this country to be a good ground for the non-production of documents.

Now, my Lords, starting there, I will observe that the grounds, whatever they are, are legal as well as equitable. There is no equitable doctrine, as distinguished from a legal doctrine, involved in the matter. Primâ facie, if a witness swears, as one of these witnesses did, to circumstances which give rise to the privilege, the privilege must prevail, unless there is a good answer. What we have to consider, therefore, is the answer to the privilege so raised.

Now, there are two answers: the first is a very short one, if it is good for anything. It is said that, the testator being dead, the privilege is gone. My Lords, I am satisfied that that answer is insufficient. I never heard it before; but it does appear that in the case of *Russell* v. *Jackson* (1) it was considered, and in the judgment of Turner V.-C. there are some passages which have been invoked in favour of that being a good answer; but they are easily explainable when one comes to look at them. The mere fact that a testator is dead does not destroy the privilege. The privilege is founded upon the views which are taken in this country of public policy, and that privilege has to be weighed, and unless the people concerned in the case of an ordinary controversy like this waive it, the privilege is not gone—it remains. In the case before Turner V.-C., for the reasons which were given by Mr. Haldane, and which are apparent in the judgment, the privilege could not be set up. One person was trying to set it up against the other, both claiming under the testator, and the Vice-Chancellor held that it could not be set up. So much for that answer.

The next answer given to this claim of privilege is that there was illegality or fraud or trickery, and that this solicitor, or those concerned, cannot set up the privilege because there is no privilege involved in consulting a solicitor as to how you

(1) 9 Hare, 387.

are to do an illegal act. That raises the question whether there was any illegality involved in the preparation of these deeds. As to that, the case stands in this way. The whole claim for this duty is based upon a Colonial Act of Parliament which renders the duty payable upon any conveyance (I am reading it short) with intent to evade the payment of duty. The word "evade" is ambiguous. There are various ways of evading a statute. The discussion and the decision which took place in the Privy Council in the case of *Simms* v. *Registrar of Probates* (1) shew the ambiguity of the expression. Now the pleadings follow the Act of Parliament. I do not see that the witness can quarrel with that in any way, and the affidavit made in support of the application for an order for the production of these documents follows the Act of Parliament—they both use the ambiguous expression "evade." As I have said, there are two ways of construing the word "evade": one is, that a person may go to a solicitor and ask him how to keep out of an Act of Parliament—how to do something which does not bring him within the scope of it. That is evading in one sense, but there is nothing illegal in it. The other is, when he goes to his solicitor and says, "Tell me how to escape from the consequences of the Act of Parliament, although I am brought within it." That is an act of quite a different character. Now when we look at the answer given to the witnesses who set up this privilege, we find that the answer says: "You are evading the Act of Parliament." What does that mean? Do you mean to say that I, as a solicitor, have been conspiring to do that which is illegal? That is not said—there is no pretence for it. If you mean that, you have not said so; if you mean evade in the other sense, your answer does not destroy the privilege. That, my Lords, is the short answer.

My Lords, it appears to me that the Court of Appeal have overlooked the fact that the word "evade" has the double meaning to which I have referred. They seem to have assumed that what was done here must have been a conspiracy to do something forbidden by the Act and to avoid the consequences of illegal conduct. Under these circumstances I think the

(1) [1900] A. C. 323.

H. L. (E.) 1901

BULLIVANT v. ATTORNEY-GENERAL FOR VICTORIA.

appeal ought to succeed, and that the order appealed from should be reversed.

Order appealed from reversed. (1)

Lords' Journals, May 2, 1901.

Solicitors: *Crowders, Vizard & Oldham; Freshfields.*

[HOUSE OF LORDS.]

H. L. (I.) 1901 *May* 14.

COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS;

AND

PRIESTLEY AND ANOTHER . . . . RESPONDENTS.

Revenue — Estate Duty — Exemption — "Any Settled Property" — "Person competent to dispose" — Finance Act, 1894 (*c.* 30), *s.* 5, *sub-s.* 2.

By a marriage settlement personal property was settled in trust for the husband for life, after his death for the wife for life, and after the death of the survivor for such persons as the wife by deed or will should appoint. The wife died, having exercised the power of appointment by will. Upon her death estate duty was paid under the Finance Act, 1894, in respect of her expectancy, upon the principal value of the settled property, the value of her husband's life interest being deducted. Upon the husband's death the Crown claimed estate duty again upon the principal value of the settled property. The settlement trustees paid the claim, but afterwards petitioned for a return of the amount, less the value of the husband's life interest, alleging that on his death estate duty became payable (if at all) only on the value of his life interest:—

Held, that estate duty having been paid upon the settled property since the date of the settlement, namely, upon the wife's death, s. 5, sub-s. 2, exempted the settled property from estate duty until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of the property, and that the husband not being such a person, the trustees were entitled to a return of the amount for which they petitioned, and that if they had claimed the return of the whole sum they had paid upon the husband's death they would have been entitled to it.

The decisions of the Queen's Bench Division and the Court of Appeal

---

(1) The order was not finally settled when this report went to press, a question having arisen as to costs.

in Ireland, [1900] 2 I. R. 281, 400, affirmed upon the grounds given by Palles C.B.

The judgment of Rigby L.J. in *Attorney-General* v. *Dodington*, [1897] 2 Q. B. 373, approved.

By a marriage settlement made in 1861 personal property of the intending wife was settled in trust for the husband, George Studdert, for life, after his death in trust for the wife for life, and after the death of the survivor (in the event which happened, the default of issue) in trust for such person or persons as the wife might by deed or will appoint, and in default of appointment in trust for her next of kin.

In March, 1897, the wife died, having by will exercised her power of appointment in favour of some of her female relatives. Estate duty was paid under the Finance Act, 1894, in respect of the wife's interest in expectancy in the settled property, she being at her death competent to dispose thereof. The total value of the settlement funds was estimated at 3564*l.* 3*s.* 4*d.*, from which was deducted the estimated value of the life interest of the husband, 413*l.* 17*s.*, leaving the net value 3150*l.* 6*s.* 4*d.*, upon which estate duty at 3 per cent. was paid by the wife's executor.

In April, 1897, the husband died, and the Commissioners claimed from the settlement trustees 106*l.* 8*s.* 11*d.*, being estate duty at 3 per cent. upon 3564*l.* 3*s.* 4*d.*, as property passing on the death of the husband. The trustees paid this claim, but, being afterwards advised that the claim should have been confined to estate duty on the value of the husband's life interest, 413*l.* 17*s.*, they petitioned the High Court in Ireland for a declaration that on the husband's death estate duty became payable (if at all) only on the value of his life interest, 413*l.* 17*s.*, being the sum deducted from the value of the securities in ascertaining the value of the wife's interest in expectancy, and for an order for repayment of 93*l.* 17*s.* 2*d.* overpaid by them. The Queen's Bench Division (Palles C.B., Gibson, and Madden JJ.), following *Attorney-General* v. *Dodington* (1) upon an analogous clause, held that under s. 5, sub-s. 2, of the Finance Act, 1894, double estate duty was not payable,

(1) [1897] 2 Q. B. 373.

H. L. (I.) 1901 — INLAND REVENUE COMMISSIONERS v. PRIESTLEY.

and made an order for the repayment of the 93*l.* 17*s.* 2*d.*, the amount of which was agreed by the parties. (1) The Commissioners appealed, and the Court of Appeal (Lord Ashbourne L.C., FitzGibbon, Walker, and Holmes L.JJ.) affirmed the order below. (2)

From these decisions the Commissioners appealed.

By the Finance Act, 1894 (c. 30), s. 5, sub-s. 2, "If estate duty has already been paid in respect of any settled property since the date of the settlement, the estate duty shall not, nor shall any of the duties mentioned in the 5th paragraph of the First Schedule to this Act, be payable in respect thereof, until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of such property."

May 13. *Sir R. Finlay, A.-G.*, and *Wright, S.-G. for Ireland* (*Vaughan Hawkins* and *C. E. MacDermot* (of the Irish Bar) with them), for the appellants. Upon the wife's death, she being a person competent at the time of her death to dispose of the settled property, estate duty became payable upon the principal value of the settled property either under s. 1 or s. 2, or both, of the Finance Act, 1894. The wife's interest being "in expectancy," a reversion upon the death of her husband (s. 22, sub-s. 1 (*j*)), the estate duty upon it was payable, at the option of the executor, either at once as an interest in expectancy, or when the interest fell into possession: see s. 7, sub-s. 6. Being paid at once, the value was estimated at the wife's death, the husband being alive. Upon the husband's death estate duty became payable again upon the principal value of the settled property, either under s. 1 as property which passed on his death, or under s. 2 as property which must be deemed to have passed, as property in which the husband had an interest ceasing on his death. There is no hardship in this. If the husband had died first, estate duty would have been clearly payable on the principal value in respect of his death. And then upon the wife's death estate duty would have been payable again upon the principal value,

(1) [1900] 2 I. R. 281. (2) [1900] 2 I. R. 400.

for she being a person competent to dispose of the property, s. 5, sub-s. 2, would not have given any exemption. The Legislature cannot have intended the right to duty twice over to depend upon the accident which of the two died first. So if payment were deferred until the husband's death the double duty would be payable, for then s. 5, sub-s. 2, would not confer an exemption. In order to make that exemption applicable, FitzGibbon L.J. reads in the words " any interest in " before the words " any settled property," and there is no warrant for this. In truth, that exemption is inapplicable; the payment in respect of the wife's death was really a payment in respect of the settlement made by her will in favour of her nieces. A similar question arose in *Attorney-General* v. *Dodington* (1) under s. 21, sub-s. 1, and if necessary that case can be overruled here.

Ingpen, *K.C.*, and *A. C. Meredith* (of the Irish Bar), for the respondents. The estate duty payable here is a tax upon physical property, not upon interests. Having been paid upon the principal value of the settled property in respect of the wife's death, the property is exempt under s. 5, sub-s. 2, until the death of a person " competent to dispose," which the husband was not.

[They referred to *Attorney-General* v. *Beech* (2) and *Earl Cowley* v. *Inland Revenue Commissioners*. (3)]

Sir R. Finlay, *A.-G.*, in reply.

May 14. EARL OF HALSBURY L.C. My Lords, in this case I entirely agree with the judgment which was given by Rigby L.J. in the *Dodington Case* (1), and I agree with the learned judges in Ireland who have taken the same view. It only remains to say that I shall move that this appeal be dismissed.

I have the less hesitation in speaking of it thus compendiously because I think it would be impossible to answer and difficult to improve upon the judgment given by the Lord Chief Baron in Ireland. It appears to me that he has exactly

(1) [1897] 2 Q. B. 373. (2) [1899] A. C. 53, 56.
(3) [1899] A. C. 198, 212.

H. L. (I.)
1901
INLAND REVENUE COMMISSIONERS v. PRIESTLEY.
Earl of Halsbury L.C.

expounded the construction and the logical effect of the language, and the only thing that one feels a difficulty about is that there is a certain amount of want of logic, considering the reasoning both in this and in the *Dodington Case* (1), in the money having been paid for duty upon the death of Mr. Studdert. But here, as there, there is no cross-appeal; the result is that we must leave the matter as it stands. I have no hesitation in expressing my own opinion that Rigby L.J. was right in that particular, and, had the question so arisen, I should have unhesitatingly agreed to a judgment which would have gone to the full extent.

The reason to my mind is very plain. The whole question turns upon s. 5, sub-s. 2. As Rigby L.J. has said, the manifest difficulty that was in the mind of the framers of the statute was that it would be unreasonable and improper in respect of settled property that the same whole estate should pay over and over again. Here it is only one life estate that is interposed, but it might be a dozen; and no doubt the framers of the statute thought that it would be extremely improper and unjust that there should be as many new duties enforced as there were persons comprehended in the settlement. The meaning and object of the statute appears to me to be both sensible and intelligible. When the death occurs of a person who is entirely able to dispose of the *whole* estate—the whole estate, be it observed—then either the thing does pass or shall be deemed to pass. Accordingly on Mrs. Studdert's death, she being the complete owner at that time and entirely able to do what she pleased with it, undoubtedly duty was payable.

What the death of the husband, who had only a life estate, has to do with it I confess I am wholly unable to understand, according to the true construction of the statute. What is to happen is that the duty is to be paid upon the whole of the property on the death of the person whom the statute treats as the person who is able to do what he or she will with the property; that is to be the guiding line. The husband was not at his death and never had been able to

(1) [1897] 2 Q. B. 373.

do what he chose with the property. Therefore under the words of s. 5, sub-s. 2, estate duty was not payable again at his death.

My Lords, I entirely agree with the reasoning of Palles C.B. It seems to me to be impossible to answer it, and, as I have said, very difficult indeed to improve upon it. Therefore, my Lords, I concur with the judgment which he (conspicuously he) and Holmes L.J. have given upon the subject, based upon what is, to my mind, the very plain construction of the statute itself—I only look at the words of the statute; the scheme of the Act, of course, may be looked at where there are doubtful words, but I think these words are not doubtful. The result is that I move your Lordships that the appeal be dismissed with costs.

LORD MACNAGHTEN. My Lords, I agree.

To my mind this is a very plain case. I think the question before the House is best answered in the fewest possible words, and as far as may be in the language of the Act itself.

On the marriage of Mr. and Mrs. Studdert a deed was executed for the purpose of regulating the enjoyment and disposition of certain funds which formed part of the lady's fortune. The deed was a "settlement"; the funds became "settled property" within the definition of those expressions in the Act. The settled property was limited to the husband for life with remainder to the wife for life, and subject thereto, in the events which happened, the property was at the absolute disposal of the wife.

The wife died in the lifetime of her husband. On her death, as it seems to me, there was no "passing" of property within the meaning of s. 1 taken by itself. No property changed hands. And therefore, in my opinion, if it had not been for s. 2, no duty would have been payable on Mrs. Studdert's death. But under s. 2 (*a*), taken in conjunction with s. 1, estate duty became leviable in respect of the settled property as being property of which, at the time of her death, Mrs. Studdert was competent to dispose. And so the Commissioners claimed estate duty in respect of the settled property on Mrs. Studdert's

H. L. (I.) 1901 INLAND REVENUE COMMISSIONERS v. PRIESTLEY. Lord Macnaghten.

death, as they were entitled and bound to do. It was then in the option of the persons accountable for the duty either to defer payment until the interest in expectancy at the time of Mrs. Studdert's death fell into possession, or to pay at once under discount. The latter alternative was the one adopted. The principal value of the settled property was estimated (as the Act directs) at the price which, in the opinion of the Commissioners, the property would have fetched if sold in the open market at the time of the death of Mrs. Studdert. The Commissioners seem to have arrived at their estimate in the ordinary way in which buyers of such property in the market make their calculations, by taking the market value of the securities forming the settled property as at the time of Mrs. Studdert's death, and then making an abatement or allowance in respect of Mr. Studdert's life interest, reckoning the probability of life according to the accepted tables of mortality. But the persons accountable for the duty have nothing to do with the mode in which the Commissioners form their opinion so long as they comply with the directions of the Act. Whatever process the Commissioners may go through in their own minds—however they may split up the property for the purpose of coming at their estimate—the duty is leviable in respect of the settled property, not in respect of any particular part or parts of the settled property, or in respect of anything short of the full amount of the property. I entirely agree with the views expressed by Rigby L.J. in *Dodington's Case* (1), which have the approval of the Chief Baron and Holmes L.J., and I am compelled to dissent from the construction placed upon the Act by FitzGibbon L.J. and Walker L.J.—a construction which seems to me calculated to reproduce the difficulties which I had thought were cleared away by the decisions of this House in *Attorney-General* v. *Beech* (2) and *Earl Cowley* v. *Inland Revenue Commissioners.* (3)

Shortly after his wife's death Mr. Studdert died. And the Commissioners now claim estate duty once more in respect of the principal value of the settled property. Are they entitled

(1) [1897] 2 Q. B. 373. (2) [1899] A. C. 53.
(3) [1899] A. C. 198.

to payment of duty over again? In my opinion, most clearly and certainly not. Since the date of the settlement, estate duty has been paid in respect of the settled property, and therefore, under the express provisions of s. 5, sub-s. 2, estate duty is not payable again on Mr. Studdert's death. He was not at the time of his death, nor had he been at any time during the continuance of the settlement, competent to dispose of the settled property. So the one and only event which could have entitled the Commissioners to estate duty on Mr. Studdert's death has not occurred.

The only difficulty about the case, in my opinion, has arisen from the circumstance that for some reason which at present I do not understand, and for which I have not at present been able to discover any authority in the Act, the respondents offered to pay, and the Commissioners seem to be prepared to accept, a sum as and by way of estate duty on the amount which the Commissioners in their own minds allowed as a deduction from the full value of the settled property at Mrs. Studdert's death, in respect of her husband's life interest.

I think the appeal should be dismissed with costs.

LORD MORRIS. My Lords, I am of the same opinion.

LORD SHAND. My Lords, I also concur.

LORD DAVEY. My Lords, I think that this property, and not any partial interest in it, must be deemed to have passed on the death of the wife under the words of s. 2, sub-s. 1, where a person is "at the time of his death competent to dispose of" the property. The Act does not add "and has disposed of it." If the power had not been executed, it seems to me strange to say that the property, which would have devolved on the persons entitled under the settlement—in this case the next of kin—should be deemed to pass on the death of the person who had the power, but had not in fact executed it. This may be hypercritical, and is certainly immaterial in the present case. We have then two events—first, the death of the wife, when the property is for the purpose of the Act

H. L. (I.) 1901 INLAND REVENUE COMMISSIONERS v. PRIESTLEY. Lord Davey.

to be deemed to have passed; secondly, the death of the surviving husband, when the property did actually pass. I have some doubt whether property which is to be deemed to have passed at one date can be said to have passed, according to the scheme of the Act, to the same persons and under the same settlement, at a later date; but that point has not been taken in the argument, and I do not desire to express any opinion of my own upon it.

For the purpose of this case I am content to rest my opinion upon the grounds fully and clearly stated in the judgment of the Lord Chief Baron in Ireland, and I agree with that learned judge in thinking that the judgment of Rigby L.J. in the *Dodington Case* (1) was correct. I agree that this appeal should be dismissed.

LORD BRAMPTON. My Lords, I concur.

LORD ROBERTSON. I concur.

LORD LINDLEY. My Lords, I entirely concur.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 14, 1901.

Vaughan Hawkins. My Lords, the Attorney-General has desired me to say that, although there is no cross-appeal, the Commissioners will, after what your Lordships have said, return the duty on the 413*l.* 17*s.*

LORD MACNAGHTEN (the Earl of Halsbury L.C. having left the House). I think the House will be of opinion that the Attorney-General has taken a very proper course.

Solicitors: *F. C. Gore, for R. O'Brien Furlong, Dublin; Whitfield & Harrison, for Rooke & Rooke, Dublin.*

(1) [1897] 2 Q. B. 373.

[HOUSE OF LORDS.]

THE COMMISSIONERS OF INLAND REVENUE . . . . . } APPELLANTS;

AND

MULLER & CO.'S MARGARINE, LIMITED . . . . . } RESPONDENTS.

H. L. (E.) 1901 May 20.

Revenue—Stamp—Agreement for Sale—Goodwill—Agreement "made" in the United Kingdom—"Property locally situate out of the United Kingdom"—Stamp Act, 1891 (*c.* 39), *s.* 59, *sub-s.* 1.

By s. 59, sub-s. 1, of the Stamp Act, 1891, any contract or agreement "made" in the United Kingdom for the sale of any estate or interest in any property "except lands . . . . or property locally situate out of the United Kingdom . . . ." is chargeable with the same ad valorem duty as if it were a conveyance on sale.

An agreement is "made" in the United Kingdom within the meaning of that section if it is executed in the United Kingdom by a party to the agreement whose execution is required to make the instrument on the face of it complete.

The words "property locally situate out of the United Kingdom" are not confined to realty and may include the goodwill of a business.

An agreement in writing to sell the premises of a wholesale manufacturing business carried on abroad together with the goodwill of the business for a lump sum was executed by the vendor abroad and by the purchaser in England. The vendor covenanted not to engage in any similar trade within fifty miles of the existing premises. All the customers of the business were abroad:—

Held, that the agreement was "made" in England, but (the Earl of Halsbury L.C. dissenting) that the goodwill was "property locally situate out of the United Kingdom" within the meaning of the section, and that the agreement was therefore not chargeable with the ad valorem duty.

The decision of the Court of Appeal, [1900] 1 Q. B. 310, affirmed.

Smelting Company of Australia, Limited v. *Inland Revenue Commissioners*, [1897] 1 Q. B. 175, commented on.

IN a case stated by the appellants the following facts appeared.

One Muller had long carried on a wholesale business as manufacturer of margarine and other butter substitutes at Gildehaus in Germany under the style or firm of Muller & Co. Muller having granted an option of purchase to Newman &

H. L. (E.) 1901 — INLAND REVENUE COMMISSIONERS v. MULLER & Co.'s MARGARINE, LIMITED.

Wigley, who transferred the option to a syndicate, an agreement was made in October, 1897, under seal between Muller as vendor, Newman, Wigley, the syndicate, and a company called Muller & Co.'s Margarine Company, Limited. This instrument was executed at Amsterdam by Muller, Newman, and Wigley, and in England by the syndicate and the margarine company. It was thereby agreed that Muller, by the direction of Newman, Wigley, and the syndicate, should sell and the margarine company should purchase—(1.) The goodwill of the business of Muller & Co., with the exclusive right to use the name of Muller & Co. as part of the name of the company, and to represent the company as carrying on the said business in continuation of the vendor and in succession to them (sic). (2.) The freehold premises mentioned in the schedule to the agreement. (3.) Certain patents and trade-marks. (4.) Plant, machinery, &c. (5.) Pending contracts of Muller & Co. (6.) Books of account, documents and papers.

The agreement contained a covenant (clause 11) on the part of the vendor not at any time thereafter to be engaged in any similar trade within fifty miles of the said freehold premises except as in the agreement excepted.

It was conceded that the subject-matters of sale, secondly, fourthly, and sixthly described, were within the exceptions contained in s. 59, sub-s. 1, of the Stamp Act, 1891, and consequently were not chargeable with ad valorem duty, and that the subject-matter of sale thirdly described had no value.

The apportioned price of the properties sold applicable to the subject-matters firstly and fifthly above described was 77,418*l*. The Commissioners, being of opinion that the instrument was made in England, and that that which was sold under the name of goodwill was the exclusive right to use the name of Muller & Co. as part of the name of the purchasing company to represent the company as carrying on the said business in continuation of the vendor as above mentioned, and also the covenant (clause 11) above referred to, held that the firstly described matters, as also the matters fifthly described, were property within the meaning of s. 59 of the Stamp Act, 1891, that neither of such matters fell within any of the exceptions

contained in that section, and that they were consequently liable to ad valorem conveyance duty. They assessed the duty accordingly at the rate of 10*s.* per cent. upon the said sum of 77,418*l.*, namely, 387*l.* 5*s.*, and also with a fixed duty of 10*s.* in respect of the other matters not chargeable with ad valorem duty. The margarine company contended that no part of the goodwill was chargeable with ad valorem duty.

The questions for the Court were—(1.) Whether the instrument was chargeable with the duty of 387*l.* 5*s.* (2.) If not, with what duty.

The Queen's Bench Division (Day and Lawrance JJ.) confirmed the assessment. The Court of Appeal (A. L. Smith, Collins, and Vaughan Williams L.JJ.) reversed this decision with costs, and held that the instrument was not chargeable with any ad valorem conveyance duty. (1)

By s. 59, sub-s. 1, of the Stamp Act, 1891, c. 39, "Any contract or agreement made in England or Ireland under seal, or under hand only, or made in Scotland, with or without any clause of registration, for the sale of any equitable estate or interest in any property whatsoever, or for the sale of any estate or interest in any property except lands, tenements, hereditaments, or heritages, or property locally situate out of the United Kingdom, or goods, wares or merchandise, or stock, or marketable securities, or any ship or vessel, or part interest, share, or property of or in any ship or vessel, shall be charged with the same ad valorem duty, to be paid by the purchaser, as if it were an actual conveyance on sale of the estate, interest, or property contracted or agreed to be sold."

March 19, 21. *Sir R. Finlay*, *A.-G.*, and *Rowlatt* (*Danckwerts*, *K.C.*, with them), for the appellants. There is no definition of "property" in the Inland Revenue Acts, but it has been held to include "goodwill" within the Stamp Acts: *Potter* v. *Commissioners of Inland Revenue*. (2) The elements of goodwill fall under three heads: (1.) where the property has a natural advantage of locality, e.g., a shop at the corner of two thoroughfares, or a business with access to water of peculiar fitness;

(1) [1900] 1 Q. B. 310. (2) (1854) 10 Ex. 147, 159.

H. L. (E.) 1901 INLAND REVENUE COMMISSIONERS v. MULLER & Co.'s MARGARINE, LIMITED.

(2.) where from the reputation of the place it is an established habit of customers to resort there, as in retail businesses; (3.) where a personal reputation of the trader has been acquired which attracts customers. The present case comes under the last head. The business is wholesale entirely, not retail; there is no peculiarity in the locality or neighbourhood which enhances the value; the goodwill is exclusively personal, and the business might be removed without loss. A manufactory such as this does not depend upon chance or passing customers; it does not matter where it is carried on: *Churton* v. *Douglas*. (1) Orders are sent direct to the office wherever it may be. "Goodwill" is incorporeal and cannot be situate anywhere. If any kind of goodwill could be described as "locally situate out of the United Kingdom" it is not this kind. It is quite different from the goodwill of a public-house, which is attached to the premises: *Ex parte Punnett*. (2) Goodwill depending on the personal skill of the trader does not pass to the mortgagee of the premises: *Cooper* v. *Metropolitan Board of Works*. (3) See as to the various meanings of goodwill *Trego* v. *Hunt*. (4) The words "locally situate out of the United Kingdom" were inserted in the Act of 1891 to exempt sales of real estate locally situate abroad: see *In re Wright and Commissioners of Inland Revenue*. (5) They were not intended to apply to anything but realty or at most fixed property: goods and chattels and movable property are exempted in the words which follow. "Locally situate" means something more than "situate." In other parts of the Act, e.g., s. 14, "situate" stands alone. Patents granted abroad and licences to use the inventions abroad, being incorporeal personal property, are not situate anywhere, and therefore are not within the exemption: *Smelting Company of Australia, Limited* v. *Commissioners of Inland Revenue*. (6) The words apply only to chattels (if at all) which are physical, tangible, and can be placed. The goodwill of a licensed business is severable from the licensed premises, and may be sold apart from the premises: *West London Syndicate*

(1) (1859) Joh. 174, 188.
(2) (1880) 16 Ch. D. 226.
(3) (1883) 25 Ch. D. 472.
(4) [1896] A. C. 7, 15, 23, 27.
(5) (1855) 11 Ex. 458.
(6) [1897] 1 Q. B. 175, 180, 184.

v. *Inland Revenue Commissioners.* (1) That decision is not consistent with the decision now under appeal. At all events so much of the goodwill as is not attached to the premises and does not enhance their value is not situate anywhere, and is therefore not exempt.

[They also referred to Lindley on Partnership, 6th ed. p. 441, where the definition and nature of goodwill and the decisions are discussed; also to *Commissioners of Inland Revenue* v. *Glasgow and South Western Ry. Co.* (2); *Walker* v. *Mottram.* (3)]

A. T. Lawrence, K.C., and *Compton-Smith*, for the respondents. There are no facts to support the argument that the goodwill of this business is a personal one. It appears from the correspondence that there were no customers in England or anywhere but in Germany. At the time the contract to sell was made (and that is the important time) the goodwill was locally situate at Gildehaus, where the factory existed and where alone customers resorted. The removal of any business from the spot where the trade is and is known to be carried on must result in some loss of custom, more or less according to circumstances, and the importance of the locality is shewn by the vendor's covenant not to carry on a similar business within fifty miles of the premises at Gildehaus. The practice in compensation cases of paying for the goodwill of a business when the premises are taken under statutory powers is conclusive. The goodwill is paid for as part of the price of the premises, and is described as an advantage attached to the possession of the premises. It implies the inclination of the customers to resort to the old place. "Goodwill" seems to have been originally connected with the use of land or buildings, and meant "permission to enjoy the use of a tenement": Murray and Bradley's New English Dictionary. (4) It is an incident to real property: *Robertson* v. *Quiddington.* (5) Where the business is entirely personal and not connected with the premises, the term is popularly but inaccurately applied: e.g., it is "wholly

(1) [1898] 2 Q. B. 507.
(2) (1887) 12 App. Cas. 315.
(3) (1881) 19 Ch. D. 355, 363.
(4) [The quotation for this sense is dated 1562. The first quotation given for the usual modern sense is of 1571. —F. P.]
(5) (1860) 28 Beav. 529.

H. L. (E.)
1901
INLAND REVENUE COMMISSIONERS v. MULLER & Co.'s MARGARINE, LIMITED.

inapplicable to a solicitor's business, which has no local existence but is entirely personal . . . . ": *Austen* v. *Boys*. (1) There is nothing novel or anomalous in treating goodwill when attached to or connected with premises as locally situate there. Probate duty is not payable here upon debts due from persons resident abroad, nor on any property which is not assets within the jurisdiction for probate purposes: *Attorney-General* v. *Bouwens*. (2) Probate duty would not be payable in England upon the goodwill of this business at Gildehaus.

Secondly, the construction put by the Court of Appeal upon the words "made in England" makes the words read "made or partly made in England." This deed was made by the vendor in Amsterdam, where he executed it. This was the important execution; possession must be taken out of England by the purchaser. The deed not having been wholly made in England is not "made in England" within the meaning of the Stamp Act. A deed operates as a deed when executed by the grantor unless it is delivered as an escrow: *Kidner* v. *Keith*. (3)

Sir R. Finlay, A.-G., in reply, on the first point, referred to *Commissioners of Stamps* v. *Hope* (4) and to *Danubian Sugar Factories, Limited* v. *Commissioners of Inland Revenue* (5), where it was held that the benefit of a contract to transfer land situate abroad was not within the words "property locally situate out of the United Kingdom."

On the second point, he contended that if a deed was executed by any party in England it was liable to the duty, and that the execution by the vendor abroad was in its nature conditional on execution by the vendee in England.

The House took time for consideration.

May 20. LORD MACNAGHTEN. My Lords, in this case your Lordships have listened to an interesting disquisition on the subject of that which is commonly called goodwill. Most, if not all, of the many cases touching upon that subject have

(1) (1858) 2 De G. & J. 626, 635–6. [See however *Burchell* v. *Wilde*, [1900] 1 Ch. 551.—F. P.]
(2) (1838) 4 M. & W. 171, 190.
(3) (1863) 15 C. B. (N.S.) 35, 40.
(4) [1891] A. C. 476.
(5) [1901] 1 Q. B. 245, 250.

been cited at the bar with the view of satisfying your Lordships that the goodwill of a foreign business, which was confined within certain known and narrow limits on the Continent, and which apparently never had a single customer in this country, cannot be described as "property locally situate out of the United Kingdom."

There are two questions in the case—(1.) Was this agreement made in England? and (2.) Was the goodwill of this business property "locally situate out of the United Kingdom"?

As to the first question I do not think there can be any difficulty. It seems to me that, according to the true construction of the Stamp Act of 1891, an agreement is made in England if it is executed in England by a party to the agreement whose execution is required to make the instrument on the face of it complete and perfect. The argument that, because s. 59 of the Act speaks of an agreement for sale and not of an agreement for sale and purchase, regard is only to be had to the execution by the vendor, is, in my opinion, too refined to be substantial. I think the agreement was made in England, and not the less so because it may also be described with equal propriety as made abroad.

I now come to the second point. It was argued that if goodwill be property, it is property having no local situation. It is very difficult, as it seems to me, to say that goodwill is not property. Goodwill is bought and sold every day. It may be acquired, I think, in any of the different ways in which property is usually acquired. When a man has got it he may keep it as his own. He may vindicate his exclusive right to it if necessary by process of law. He may dispose of it if he will—of course under the conditions attaching to property of that nature.

Then comes the question, Can it be said that goodwill has a local situation within the meaning of the Act? I am disposed to agree with an observation thrown out in the course of the argument, that it is not easy to form a conception of property having no local situation. What is goodwill? It is a thing very easy to describe, very difficult to define. It is the benefit and advantage of the good name, reputation, and connection

H. L. (E.) 1901 INLAND REVENUE COMMISSIONERS v. MULLER & CO.'S MARGARINE, LIMITED. Lord Macnaghten.

of a business. It is the attractive force which brings in custom. It is the one thing which distinguishes an old-established business from a new business at its first start. The goodwill of a business must emanate from a particular centre or source. However widely extended or diffused its influence may be, goodwill is worth nothing unless it has power of attraction sufficient to bring customers home to the source from which it emanates. Goodwill is composed of a variety of elements. It differs in its composition in different trades and in different businesses in the same trade. One element may preponderate here and another element there. To analyze goodwill and split it up into its component parts, to pare it down as the Commissioners desire to do until nothing is left but a dry residuum ingrained in the actual place where the business is carried on while everything else is in the air, seems to me to be as useful for practical purposes as it would be to resolve the human body into the various substances of which it is said to be composed. The goodwill of a business is one whole, and in a case like this it must be dealt with as such.

For my part, I think that if there is one attribute common to all cases of goodwill it is the attribute of locality. For goodwill has no independent existence. It cannot subsist by itself. It must be attached to a business. Destroy the business, and the goodwill perishes with it, though elements remain which may perhaps be gathered up and be revived again. No doubt, where the reputation of a business is very widely spread or where it is the article produced rather than the producer of the article that has won popular favour, it may be difficult to localise goodwill. But here, I think, there is no difficulty. We have it in evidence that the firm of Muller & Co. had no customers out of Germany, and it is a significant fact that the protected area—the limit within which the vendor is prohibited from setting up in business—is the limit of fifty miles from Gildehaus. Moreover, under the Stamp Act of 1891 we are not required to define the local situation of the goodwill. We have only to determine whether it is or is not situate out of the United Kingdom. Surely, if there were an agreement made in England for the sale of a local German newspaper, the

circulation of which did not extend beyond a limited district in Germany, no one would doubt that the goodwill of that business was locally situate out of the United Kingdom; and so it must be, I think, in the present case.

I am therefore of opinion that the judgment of the Court of Appeal is right and ought to be affirmed, and I move your Lordships accordingly.

LORD DAVEY. My Lords, the questions on this appeal arise on the construction of a few words in s. 59, sub-s. 1, of the Stamp Act, 1891. By an agreement under seal the goodwill of a business carried on in Germany, together with the factory and buildings in which the business was carried on, and all the plant, machinery, apparatus, rolling stock, and chattels employed in the business except stock-in-trade and all pending contracts and orders in connection with the business, books of account, documents and papers, was agreed to be sold for a lump sum to the respondents, who are an English company. The principal question is, whether the goodwill so agreed to be sold was either wholly or partially "property situate out of the United Kingdom" within the meaning of the exception in the section referred to. But other subsidiary points have been argued to which I will first address a few remarks.

First, it was said that the agreement was not made in England because the vendors executed it in Amsterdam. It was not, however, a completed agreement for purchase and sale till it was executed by the purchasers, and that was done in England. It was argued that the acceptance by the purchasers might have been proved by oral evidence, which is true. But what we have to deal with is the document in which the acceptance by the purchasers was expressed by the execution of it in this country.

Another point made was on the construction of the section. It was suggested that the word "property" ought to be read as ejusdem generis with the words which immediately precede it, namely, "lands, tenements, hereditaments or heritages," and to be confined to real property. The first observation which occurs to one is that if such had been the intention it

H. L. (E.)
1901
INLAND REVENUE COMMISSIONERS v. MULLER & Co.'s MARGARINE, LIMITED.
Lord Davey.

would have been so easy to have expressed it—to have said "real property." But the word "property" occurs in two places in the earlier part of the section. It is there used in its widest sense as meaning property of every description, and I can find no sufficient reason in the context for thinking that it is used in a more restricted sense in the passage in question. The clause is drawn in rather a confused manner. The material words are, "any contract or agreement . . . . for the sale of any estate or interest in any property except lands, &c., or property locally situate out of the United Kingdom or goods, &c." Whatever the word "property" means in the words imposing the duty, I think it must have the same meaning in the words of exception. It is not disputed that property in its wider sense may include whatever rights or benefits pass under the term "goodwill."

I pass now to the principal question which has been argued, namely, whether goodwill can be said to be situate outside the United Kingdom or to have any local situation. A more accurate way of stating the question would, in my opinion, be whether the goodwill which is comprised in this contract has a locality for the purpose of the Stamp Act. Now, the subject of the contract is the sale as a going concern of a German manufacturing and commercial business carried on by a German in Germany with the buildings in which the business is carried on, and all the plant, &c., necessary for carrying it on. It does not appear to me that the mention of goodwill adds anything to that which would be included in a sale of the business. What rights pass to the purchaser of the goodwill, in my opinion, depends primâ facie on the German law; but the parties have to a certain extent defined them for themselves, as "the exclusive right to use the name of Muller & Co. as part of the name of the company, and to represent the company as carrying on the said business in continuation of the vendors and in succession to them," and they have protected the purchaser by the vendor's covenant not to carry on the business of manufacturers of margarine at any time thereafter within fifty miles of the business premises. It is said that the purchaser might remove the business (say) to England. Whether he

could do so and still retain the rights conferred by the contract is, in my opinion, a question of German law. It seems to me, however, immaterial whether they can do so or not, because (I repeat) this business was at the date of the contract in Germany. What we have to look at is the state of things at the date of the contract; and the possibility of its removal no more affects the question than if it were a valuable chattel such as a picture or a statue.

The position taken up by the Attorney-General was a singular one, and somewhat embarrassing to persons who have to stamp their contracts. He admitted that, so far as the goodwill was attached to the business premises and thereby enhanced their value, he did not claim that an ad valorem stamp should be affixed in respect of that value. But I am not aware that you can split up goodwill into its elements in that way, and I see great difficulty in doing so. The term goodwill is nothing more than a summary of the rights accruing to the respondents from their purchase of the business and property employed in it. As that business and property undoubtedly had their local habitation in Germany at the date of the contract, I have no difficulty in the conclusion that the Court of Appeal were right, and this appeal ought to be dismissed.

I do not find it necessary to say anything about the numerous cases which were referred to in the course of the argument, because, in my opinion, they have no direct bearing on the case, nor do I express any opinion on the abstract question whether an incorporeal right can have a local situation, beyond saying that I am not impressed with the difficulty of holding that it may have one for revenue purposes in analogy to the decisions in the probate cases.

LORD JAMES OF HEREFORD. My Lords, I share the view that the judgment of the Court of Appeal is correct, and that this appeal should be dismissed. For the reasons already given I think the contention of the Crown, that this contract was made in England, is correct. The principal question for decision by your Lordships no doubt afforded great opportunity for ingenious argument; but that question can, I

H. L. (E.) 1901

INLAND REVENUE COMMISSIONERS v. MULLER & CO.'S MARGARINE, LIMITED.

Lord James of Hereford.

think, easily enough be solved by the application of mere common sense.

The question whether the agreement for the sale of the goodwill of a manufacturing business should be charged with an ad valorem stamp under the Stamp Act of 1891, depends upon the application of certain facts existing in this case to the words of that Act. The business sold was a wholesale manufacturing business carried on in premises situated at Gildehaus in Germany. All the stock and plant of the company were on those premises. All the customers of the company were resident in Germany.

Now, as the Stamp Act imposes no duty on agreements referring to property locally situate out of the United Kingdom, the question arises, Where is the goodwill of this business to be found? I would premise that in my view no substantial difference can be established between the words "locally situate" and the word "situate." It is admitted that goodwill is property within the Act—and the Act assumes that the property, primâ facie all the property mentioned in the Act, may be situate out of the United Kingdom. Now, in this case we have a business in respect of which a goodwill exists. This business without doubt lies abroad. It cannot be otherwise, for premises, plant, manufacture, trade residence of customers, are all in Germany. And this business, locally situate out of the United Kingdom, has a goodwill attached to it. It is difficult to separate them—certainly out of the business the goodwill springs, and its value depends entirely upon the local existence of the premises and the manufactory, and the existence and action of more or less local customers. The parties to the agreement certainly attached value to the continuance of the business in the locality; for the vendor contracted not to carry his business on within fifty miles of the existing premises.

I entirely dissent from the view that the goodwill of a business, either wholesale or retail, cannot be locally situated. On the contrary, I should say that the goodwill of most businesses is locally situated. There may be exceptions, but this case is not one of them, and I therefore think that no

stamp duty is chargeable upon that part of the agreement which refers to the goodwill of the business sold, and that therefore the judgment of the Court of Appeal should be affirmed.

LORD BRAMPTON (after stating the facts given above). Upon this state of things, the first question raised is whether this instrument of agreement was made in England; for upon it, and it alone, if at all, can the stamp duty now sought to be imposed be charged.

If the question were, In which country was the instrument executed? the only possible truthful answer would be, Partly in Holland and partly in England. But when the question is, Where was the *contract* made? one is driven to say, It was not in Holland, for while in that country, though it was then signed and sealed by the vendor and two of the intermediates, it lacked the execution of the syndicate and of the vendee, which was essential to its validity as a contract. It only became a perfect contract when the purchasing company and the syndicate affixed their respective common seals to it. It was suggested, however, that there must have been an oral contract made in Germany before the written instrument was prepared; that, however, would not assist the respondent company, for it is only the written instrument which requires to be, or is capable of being, stamped. I may add that by the Stamp Act the duty is to be paid by the purchaser, and the written instrument could not bind the purchasing company until it was executed by that company's common seal. So far as the contract by the purchasers was concerned, it was entirely made in England. For these reasons I have no hesitation in answering the first question in the affirmative in favour of the Crown.

As to the second question, I think it is very clear that no equitable estate or interest in the property was ever vested in either Newman, Wigley, or the syndicate. The whole interest, both legal and equitable, remained in the vendor until the rights of option to purchase were exercised by the intermediate parties in the manner hereinbefore described, and carried out

H. L. (E.) 1901 INLAND REVENUE COMMISSIONERS v. MULLER & Co.'s MARGARINE, LIMITED. Lord Brampton.

by the written contract. This question, therefore, must be answered in the negative against the Crown.

The remaining question is, whether the goodwill of the business, sold as it undoubtedly was in one contract, and as part of one subject-matter of sale, with the buildings, houses, and land in and upon which the business was carried on by the vendor, was property locally situate out of the United Kingdom. I think it was. Whether the goodwill and the land and the factory are rightly to be treated as combined and inseparable, or as separated from each other, each is undoubtedly property within the meaning of the Stamp Act, and has been decided so to be by a long string of cases, of which I will only mention that of *Potter* v. *Commissioners of Inland Revenue*. (1)

Granting that a goodwill is property, the question still remains, Was the goodwill in this case, when it was purchased by the company, "property locally situate out of the United Kingdom"? The answer to this depends, in my judgment, upon whether at the time of the making of the written contract the goodwill was attached to and incorporated with the business premises, and formed in the hands of the then vendor an inseparable property, very valuable in its combination as giving to the premises a character and an increase of value which, stripped of the goodwill, they would not have possessed, and which represents the value of the profit-earning quality of those premises, when and so long as they are used by the then occupier, for carrying on in them the business he had created within them, by reason of the attraction of customers from any of those causes which tend to make a prosperous business; for that is what the vendor had to sell, and sold; and the question must be determined having regard to the time when the contract of sale was made, and not regarding anything the vendee might think fit to do with the premises in the future.

This word "goodwill," when used in connection with the sale and purchase of a trade, must, I think, be interpreted according to its popular acceptation. Taken in its strictest sense, "goodwill" would hardly be a saleable commodity at all.

I do not say there may not be such a thing as a goodwill of

(1) (1854) 10 Ex. 147.

a business utterly unconnected with the premises in which the business has been previously carried on, for it is quite possible that a man retiring from business might wish to retain the premises for his own private use, and sell merely the goodwill; but, as was pointed out by Pollock C.B. in *Potter's Case* (1), there is a wide difference between the sale of a goodwill together with the premises in which the trade is then carried on, whereby the value of the premises is enhanced, and the sale of a goodwill without any interest in land or buildings connected with it, and which is merely the advantage of the recommendation of the vendor to his connections and customers, and his covenant to allow the vendee to use his trade name, and to abstain from competition with him.

In the first of these cases the trade and the premises are inseparable so long as the trade is therein carried on. The advantages and facilities constituting the goodwill are all more or less derived from them, or the profitable results of such goodwill are therein realized. The goodwill of a trade carried on in a shop is as essential to the tradesman as the shop itself, which is benefited by it. What is the trade of a shop but the business done in it, and how is that custom brought to the shop but by the goodwill attached to it? The combination of a suitable shop with the trade done in it, and the goodwill inducing that trade, seem to me to be inseverable. In my judgment, it matters not whether the business be a manufacturing one, or that of a shopkeeper, or a publican, or a brewer; in each case the seller of his business premises with his goodwill sells, and the purchaser buys, the outgoing man's premises, with, so far as in him lies, the whole business carried on therein as a going concern, with the same prospects the vendor himself would have had, had he continued it; and I think it immaterial whether the business has been built up by reason of the personal good qualities of the outgoer, the goodness of his wares or merchandise, the good situation of the premises, or the absence of competition; in each case the business and custom, in fact, have been attracted to the house or premises, and when the incomer takes possession, he takes all the chances

(1) 10 Ex. 147.

H. L. (E.) 1901 INLAND REVENUE COMMISSIONERS v. MULLER & Co.'s MARGARINE, LIMITED. Lord Brampton.

offered and conveyed to him by his purchase, of standing, so far as the business is concerned, in the shoes of the outgoer, and he must rely upon his own good qualities and aptitude for his undertaking to continue the prosperity of the business and profit by his bargain.

Dealing with an argument touching an injury to the custom of a public-house, Lord Westbury in *Ricket* v. *Metropolitan Ry. Co.* (1) says: "It is a fallacy, almost a mockery, to answer, the custom is one thing and the house another; and the injury is to the custom, not to the house. You cannot sever the custom from the house itself, or from the interest of the occupier, for the custom is the thing appertaining to the house which gives it its special character, and constitutes its value to the occupier." In short, as was observed by the Court of Exchequer, "the goodwill is part of the value of the property."

The judgment of Lord Esher M.R. in *Commissioners of Inland Revenue* v. *Angus* (2) is to the same effect.

It must not for a moment be imagined that these observations are intended to affect in the least degree the present mode of assessing, for sale or compensation purposes, the value of premises to which a goodwill is attached.

In this case the business sold was commenced, and its reputation was made and established, on these premises, and nowhere else. The margarine and butter substances have all been there manufactured, at this factory; all the orders of customers, for the most part resident in Germany, have been received at it, and from it the manufactured commodities have been delivered. I care not to inquire into the reasons for its success, for there is the business, consisting of goodwill and premises combined, for which, in their combination as vendors, the vendees voluntarily consented to pay the large sum of money mentioned in the contract.

The vendees may, of course, deal as they please with the future of that which they have bought. We have only to deal with it as it stood at the time of the sale. I cannot understand how that business goodwill, so attached, can be treated, or spoken of, as being otherwise than locally situate in Germany.

(1) (1867) L. R. 2 H. L. 175, at p. 204. (2) (1889) 23 Q. B. D. 590.

The cases referred to in the Divisional Court and in the Court of Appeal have been so completely disposed of by each of the Lords Justices, that I do not feel it necessary to say more about them; both are distinguishable from the present, even if rightly decided.

I think the judgment of the Divisional Court was rightly reversed by the Court of Appeal, and that this appeal should be dismissed with costs.

LORD ROBERTSON. My Lords, I am bound to say that on the main question argued my judgment, which is against the appellants, is dependent on a fact which does not appear in the stated case; but the learned Attorney-General argued upon the assumption that it is true as stated by the respondents' solicitors in their letter of December 14, 1897 (in answer to a categorical question of the Board of Inland Revenue) that "the whole of the regular customers" [of Muller] "are resident within the country in which Gildehaus is situate, namely, Germany, and that there is no trade whatever transacted outside the latter country." Now, when this is taken along with the fact that the manufactory and, so far as appears, the office were at Gildehaus, the case is, so far as facts are concerned, as compact and free from complication as any case could be which gives rise to the present question. So far as the seat of trade and so far as the trade itself are concerned, everything is out of the United Kingdom, and of nothing connected with the trade can it be predicated in any sense whatever that it was not out of the United Kingdom.

This consideration seems to me to lift the case clean over such questions and phrases as whether the goodwill is attached or affixed to the manufactory. I do not accede to the view that the goodwill is affixed or attached to the manufactory. Supposing that the products of the manufactory were all exported to England and sold to English customers, I should find it difficult to hold that the goodwill was out of England merely because the manufactory was. The application of the words "locally situate" would then present a different question, requiring, I should think, a different answer. Again, if the

H. L. (E.) 1901 INLAND REVENUE COMMISSIONERS v. MULLER & CO.'S MARGARINE, LIMITED, Lord Robertson.

facts as to the distribution of the products were more complicated, as, for example, if the trade were diffused over England and other countries, then the location of the goodwill would be a more complex, although I do not by any means think an insoluble, problem.

I confess I find no repugnancy in affirming of the goodwill of a business that it is locally situate somewhere. It is, I should say, locally situate within the geographical limits which comprehend the seat of the trade, and the trade. That sounds like a very cautious statement, and fortunately it is enough for the present question. It seems to me that in the statute the distinction drawn is between what from a British point of view we should call British property and foreign property; and the goodwill of a business which begins and ends abroad is, I think, property locally situate outside the United Kingdom.

On the point as to the place of the execution of the agreement, I have nothing to add.

LORD LINDLEY. My Lords, before addressing myself to the main controversy in this case, I will say a few words on one or two minor points arising on the construction of s. 59 of the Stamp Act, 1891.

It was said that the agreement for sale in this case was not made in England, because the selling company signed it abroad and the purchasing company signed it in this country. Until the purchasing company signed it there was no written agreement, but only an offer to sell. The document was made complete as a contract for sale by what was done in this country, and I have no doubt, therefore, that s. 59 applied to it.

Then comes the question whether the word "property" in the exception is confined to real property or extends also to personal property. In my opinion, it includes personal property. Property is used in the widest possible sense in the earlier part of the section, and it appears to me to be used in the same sense when repeated in the exception. The words "lands, tenements, and hereditaments" themselves exhaust real property,

and the introduction after them of the word "property" shews that something more is to be excepted. Nothing more can be suggested which is ejusdem generis, and nothing but personal property remains. Upon this point my own opinion coincides with that of Rigby L.J. in the case of the *Smelting Company of Australia*. (1)

But even if the word "property" in the exception extends to corporeal personal property which can have a local situation, it is contended that incorporeal property, such as goodwill, cannot be said to be locally situate anywhere, and cannot, therefore, fall within the exception. This is the main contention of the appellants. It is necessary to deal with it, as it has not been contended that goods, wares, and merchandise cover goodwill, and if goodwill is to be excepted it must be because it is property locally situate abroad.

Goodwill regarded as property has no meaning except in connection with some trade, business, or calling. In that connection I understand the word to include whatever adds value to a business by reason of situation, name and reputation, connection, introduction to old customers, and agreed absence from competition, or any of these things, and there may be others which do not occur to me. In this wide sense, goodwill is inseparable from the business to which its adds value, and, in my opinion, exists where the business is carried on. Such business may be carried on in one place or country or in several, and if in several there may be several businesses, each having a goodwill of its own.

That in some cases and to some extent goodwill can and must be considered as having a distinct locality, is obvious, and was not in fact disputed. The goodwill of a public-house or of a retail shop is an instance. The goodwill of a business usually adds value to the land or house in which it is carried on if sold with the business; and so far as the goodwill adds value to land or buildings, the goodwill can only be regarded as situate where they are. In such a case the goodwill is said to be annexed to them.

This consideration alone would, in my opinion, suffice for the

(1) [1897] 1 Q. B. 182.

H. L. (E.) 1901 INLAND REVENUE COMMISSIONERS v. MULLER & Co.'s MARGARINE, LIMITED. Lord Lindley.

determination of this case; for the factory, business, and goodwill were all sold together for a lump sum, and I do not myself see why the goodwill should be dealt with as having value apart from the factory. But even if the goodwill in the case before us can be properly regarded as to some extent separable from the factory, I still think it must be treated as locally situate abroad.

The goodwill sought to be taxed is that of a manufacturer of margarine. His business was to manufacture and sell. His factory was in Germany; the owner was a German living in Germany; he had no agency or place of business abroad; his customers were all in Germany, and his business, so far as selling was concerned, was a wholesale and not a retail business. He covenanted not to carry on business within fifty miles of the old place. If, therefore, the goodwill of a wholesale manufacturer can be regarded as situate anywhere, the goodwill in this case can only be regarded as situate in Germany. Not one of its elements is, or can possibly be, regarded as situate anywhere else. The contention for the Crown was that some part of the goodwill, namely, such part of it as did not simply enhance the value of the land and buildings of the factory, could not be regarded as situate anywhere, and was, therefore, liable to stamp duty. This view, if sound, would be very embarrassing to buyers and sellers, who have to see that they stamp their agreements properly. But the view contended for is, in my opinion, quite untenable.

Goodwill is only taxable as property; and the legal conception of property appears to me to involve the legal conception of existence somewhere. Incorporeal property has no existence in nature and has, physically speaking, no locality at all. We, however, are dealing not with anything which in fact fills a portion of space, but with a legal conception, or, in other words, with rights regarded as property. But to talk of property as existing nowhere is to use language which to me is unintelligible.

The authorities which bear upon the locality of incorporeal personal property for purposes of probate appear to me to afford the best guides for the solution of the case before us.

Those cases tend strongly to shew that, for purposes of probate, goodwill, except so far as it merely enhances the value of lands and hereditaments, must be regarded as personal property situate somewhere; and if this were a probate case I do not suppose that any one would say that the goodwill with which we have to deal would be regarded as in any sense situate in this country. The *Commissioners of Stamps* v. *Hope* (1), in which the locality of debts for probate purposes is considered, contains some valuable general remarks on the subject; but there is nothing in that case which conflicts with the view I take of this goodwill.

It may perhaps be true that property which has no physical existence may, if necessary, be treated for some purposes in one locality, and for other purposes in some other locality. But, until the necessity for so treating it is apparent, I see no justification for introducing confusion by judicially holding the same property to be legally situate in two different places at one and the same time. But this confusion would be introduced if your Lordships were to decide that the analogy of probate cases was to be no guide in dealing with liability to stamp duty.

I am not aware of any case in which goodwill, as property, has been treated as having no locality for legal purposes. The *Smelting Company of Australia, Limited* v. *Commissioners of Inland Revenue* (2), so much relied upon by counsel for the Crown, was not a case of goodwill at all. The property then in question was not the goodwill of a business, but a share in an Australian patent, and a licence to use the same in Australia. This share and licence belonged to an English registered company, which agreed to sell it to another English company, and the question was whether the instrument of agreement required a stamp. The Court decided that the share and licence were property, and came within the first part of s. 59, clause 1, of the Stamp Act, 1891. But they held that such property could not be regarded as locally situate abroad. Lord Esher and Lopes L.J. considered that incorporeal personal property could not be said to be situate anywhere. This is,

(1) [1891] A. C. 476. (2) [1897] 1 Q. B. 175.

H. L. (E.) 1901 INLAND REVENUE COMMISSIONERS v. MULLER & Co.'s MARGARINE, LIMITED. Lord Lindley.

of course, true, physically speaking, but not, I think, in contemplation of law. Rigby L.J. did not adopt the reasoning of the other members of the Court. He referred to the probate decisions; but he considered that, as the property was saleable and sold in this country, it could not be regarded as locally situate out of it. I am not myself able to adopt this conclusion arrived at by Rigby L.J. Any property situate anywhere can be agreed to be sold or purport to be sold in any other country, and the test of locality relied upon by the Lord Justice was not, I think, the true one. The patent was not assignable without registration in Australia, and the view of the Lord Justice is, I think, opposed to *Attorney-General* v. *Dimond* (1), the case of French Rentes. Be this as it may, in the Australian patent case the Court was not dealing with the goodwill of a foreign manufacturing business, and it would be wrong, I think, to treat the decision as governing the case before us.

In my opinion, the decision appealed from ought to be affirmed, and the appeal dismissed with costs.

EARL OF HALSBURY L.C. My Lords, I regret to say I am unable to concur in the view which has found favour with your Lordships in this case.

The goodwill of a business is what the word itself expresses, although the concurrence of so many of your Lordships leads me to doubt what I should otherwise have had no doubt upon. The advantages which may be conferred upon a business, either by its local situation or by its attractive appearance, have nothing to do with the goodwill, although they may have originally contributed to procure it, and may, to some extent, be connected with the nature of the business, which itself, however, is a different thing. "The goodwill thereof" is a thing which can be assumed to exist separately. Like every other thing which suggests one simple idea, it is difficult, if not impossible, to define it. The right to trade under the name of a firm which has acquired a reputation is not confined to a particular locality or to any particular premises. The right would remain if the business were transferred to another site

(1) 1 C. & J. 356; 35 R. R. 372.

elsewhere, or if the premises were entirely altered. In the case of a public-house, owing to the convenience of its situation and its being known as a favourite place of resort, the advantages of its situation are so mixed up with the goodwill of the business that, as a matter of fact, it may well be that it is very difficult to sever them, and to say how much is goodwill and how much is local situation. But those difficulties of fact will not necessarily make their separate existence impossible. In compensation cases, for instance, where a man is being turned out of his holding and has to be put into the same position, so far as compensation can do it, by money which is to be awarded to him, it is unnecessary to regard any such severance into the different elements which make up the advantages of his holding. He is to be compensated for the loss which he has sustained by the alteration of his premises, or the removal of his trade from those premises, and for the extent to which his business may be injured under the circumstances, and it would be quite unnecessary to consider how much he is to be allowed for each element because he is, so far as the tribunal can do it, to be placed in the same position as he was in before. The illustrations which are given of businesses, for instance, the business of a local newspaper, seem to me not to touch the question. It may be very probable that in such a case there would be no goodwill of the business, or very little, but the mere fact that the business was practically, or altogether, local would not make the goodwill of the business simply local, unless by the contract of sale it was confined to a particular spot. In the particular case now under review, the vendors would not be entitled to come to this country and set up a business here under that name and claim the goodwill of customers who might have been brought together in Germany. The right to the goodwill was absolutely transferred to the vendees here. I think if, in order to ascertain what would be the rights of the parties, one looked at the contract apart from any question arising as to the limit of fifty miles, one would see that the thing transferred was the goodwill of that business, whatever it consists of: that would be in every part of the world. The question whether it would

H. L. (E.) 1901 INLAND REVENUE COMMISSIONERS v. MULLER & Co.'s MARGARINE, LIMITED.

be worth the while of the parties to transfer it is a question quite beside that which in point of law constitutes goodwill. I am wholly unable to see that goodwill itself is susceptible of having any local situation.

In my opinion, therefore, the judgment of the Court of Appeal ought to be reversed; but as the majority of your Lordships take a different view, of course the appeal will be dismissed, and the judgment of the Court of Appeal affirmed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 20, 1901.

Solicitors: *F. C. Gore; H. A. Graham.*

[HOUSE OF LORDS.]

H. L. (E.) 1901 *May* 20.

KEIGHLEY, MAXSTED & CO. . . . . APPELLANTS;

AND

DURANT (CARRYING ON BUSINESS AS BRYAN DURANT & CO.) . . . . . RESPONDENT.

Contract—Sale of Goods—Principal and Agent—Undisclosed Principal—Ratification.

A contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

The decision of the Court of Appeal, [1900] 1 Q. B. 629, reversed for the reasons there given in the dissenting judgment of A. L. Smith M.R.

ROBERTS, a corn merchant at Wakefield, was authorized by Keighley, Maxsted & Co., the appellants, to buy wheat on a joint account for himself and them at a certain price. Roberts having failed to buy at the authorized price, on May 11, 1898, without authority from the appellants, made a contract by telegram with the respondent Durant, a corn merchant in

London, to buy from him wheat at a higher price. Roberts made the contract in his own name but, as he afterwards said at the trial, intending it to be on a joint account for the appellants, Keighley, Maxsted & Co., and himself. That intention was not disclosed by Roberts to Durant. The next day the appellants, by their manager Wright, agreed with Roberts to take the wheat on a joint account with him. Roberts and the appellants having failed to take delivery of the wheat, Durant resold it at a loss and sued them for the amount in an action tried before Day J. and a special jury. At the close of the plaintiff's case, the jury having been discharged, Day J. dismissed the action against the appellants on the ground that there was no ratification in law of the contract, and gave judgment against Roberts for the amount claimed. The Court of Appeal (Collins and Romer L.JJ., A. L. Smith M.R., then L.J., dissenting) reversed the decision as regards the appellants, and ordered a new trial on the ground that there was evidence for the jury that Roberts contracted on behalf of himself and the appellants.

March 11, 12, 14, 15. *Carver, K.C.*, and *Danckwerts, K.C.* (*Montague Lush* with them), for the appellants. The decision of the Court of Appeal for the first time asserts the proposition that a contract made by a man in his own name, intending it to be on behalf of a third party who has not authorized it but keeping his intention secret, can be ratified by that third party so as to make himself able to sue or liable to be sued on the contract. For this proposition there is absolutely no authority in English law. There is a long and continuous stream of authorities the other way. This has been fully and clearly established by the judgment of A. L. Smith L.J. The proposition is in truth founded on a fallacy in respect of ratification. A contract made by an agent in his own name (as the present contract was) does not require and cannot receive any ratification: it is complete in itself. Ratification is only necessary where a contract is made which is not valid without ratification, e.g., where an agent professes to contract as agent for a principal named or undisclosed. Ratification has no application

H. L. (E.) 1901

KEIGHLEY, MAXSTED & CO. v. DURANT.

unless the person making the contract professes to act as agent. The contract in the present case being complete, no third party could be introduced into it except by a new contract, and no new contract is here made or alleged. Story's opinion is clear: "A ratification can only be effectual between the parties, when the act is done by the agent avowedly for or on account of the principal, and not when it is done for or on account of the agent himself, or of some third person. This would seem to be an obvious deduction from the very nature of a ratification, which presupposes the act to be done for another, but without competent authority from him; and therefore gives the same effect to the act as if it had been done by the authority of the party for whom it purported to have been done and as his own act. Hence it has been laid down as a maxim of the canon law, 'Ratum quis habere non potest, quod ipsius nomine non est gestum.' The same rule was early recognised in the common law, and has been recently explained in a most satisfactory manner": Story on Agency, 9th ed. s. 251 a, and see the notes thereto, discussing the decisions. This passage does not appear to have been published till after Story's death in 1845, but must have been left by him in MS. for the next edition, since it is not placed between brackets: see the 3rd edition published in 1846, and the 4th in 1851. The passages from the Digest cited in the judgment of Collins L.J. (1) do not support the conclusion drawn from them. (2) "Contemplatio" can hardly mean what is imputed to it, but what the passages mean matters little: they have never been adopted in English law.

[In addition to the cases discussed in the Court of Appeal they cited *Kelner* v. *Baxter* (3); *Brook* v. *Hook* (4); *Buron* v. *Denman* (5); *Phillips* v. *Eyre* (6); Sohm's Institutes of Roman Law (2nd ed. by Ledlie), ss. 45, 88; Fry on Specific Performance, 3rd ed. s. 528, and p. 711, "Additional note A."]

Robson, K.C., and *Scrutton, K.C.*, for the respondents. It is

(1) [1900] 1 Q. B. 647–9.
(2) See the judgment of Lord Robertson.
(3) (1866) L. R. 2 C. P. 174.
(4) (1871) L. R. 6 Ex. 89.
(5) (1848) 2 Ex. 167.
(6) (1870) L. R. 6 Q. B. 1.

not accurate to say that there are no authorities in English law in favour of the proposition that an unexpressed intention on the part of the agent when he makes the contract is enough. Besides *Foster* v. *Bates* (1) there are the decisions referred to in the judgment of Collins L.J. and the notes to *Armory* v. *Delamirie* (2), which establish the proposition that if the agent intends to make the contract on behalf of a principal, though he does not express the intention, the contract may be ratified by the principal so as to bind him. The other contracting party is not injured or prejudiced: he does not, it is true, know that he is contracting with the principal. But neither does he know this when a contract is made on behalf of a principal who has authorized the agent, if the agent does not avow his agency. And yet in that case he can sue or be sued by the principal. It is for his benefit to have the liability of the principal for the contract, and the principal can only enforce the contract subject to all rights which exist against the agent. The two cases, therefore, stand on the same ground in principle. Further, it is clear that a contract made by a person stating that he is acting for another, though he has no authority, may be ratified by that other. If it is not necessary that the authority should exist in fact, why should it be necessary that the agent should profess to have authority?

[They also referred to Van Leeuwen's Commentaries on Roman-Dutch Law, vol. ii. (ed. 1886), bk. 4, c. 26, pp. 220–3.]

The House took time for consideration.

May 20. EARL OF HALSBURY L.C. My Lords, there are here no facts really in dispute in this case. Roberts made a contract on his own behalf and without the authority of anybody else. The contract was made and the parties to it ascertained, and I am of opinion that upon no principle known to the law could the present appellants be made parties to that contract. They could, of course, make another contract in the same terms if they pleased, but it would not be this contract. It is suggested by the judgment of the Court of Appeal as

(1) (1843) 12 M. & W. 226. (2) 1 Sm. L. C. 10th ed. pp. 343, 348.

H. L. (E.) 1901 KEIGHLEY, MAXSTED & Co. v DURANT. Earl of Halsbury L.C.

possible, that what is described as ratification might, if the parties had so pleased, make the contract, which was one made between A. and B., to include C. as one of the contracting parties. I think such a suggestion is contrary to all principle, and for it there is no decision which calls for your Lordships to override it, though I confess I should have no hesitation in doing so if there were. The parties to the contract, who have already bound themselves by it, are just as much part of the contract as any other part of the contractual obligations entered into.

I confess I do not see the relevancy of the argument that a contract might be made in the name of an unknown principal, and that such a principal may sue and be sued, though the name was not given at the time the contract was made. The fact is that in such a case the contract is made by him, and the disclosure afterwards does not alter or affect the contract actually made. Here it would alter the contract afterwards and make it a different contract. If it is said it is an anomaly, it certainly is not the only one in our law, and if it were sought to make our laws harmonious by deciding that any proposition which our laws establish involves as a necessary consequence the establishment of everything that is analogous to it, the result would be very perplexing indeed. I agree with the Master of the Rolls that a long line of authorities has decided the question in favour of the view which he maintains.

My Lords, I should say no more but for Collins L.J.'s appeal to the Roman law, and, with great respect for anything that falls from the Lord Justice, I cannot think that if the law were as there laid down it would help the present respondents. I do not think the passage in the Digest upon which he founds his argument refers to what we call ratification at all; but I wish to add that, if it could be clearly made out that it did so, I should not be much impressed by it. There are parts of the Roman law which undoubtedly we have made part of our own law, and they are binding on us, not because they are part of the Roman law, but because they have become part of our law. There are some countries which have made the Roman law their own, but in this country we have never adopted it in

such a wholesale fashion. Hale C.J. said the sources of the English law are as undiscoverable as the sources of the Nile, and although in our day such a phrase cannot be appropriately used, it was true in Hale's time. Our law differs in most important respects from the Roman law, and to quote the latter as an authority we must shew that it has become part of our own jurisprudence.

I move your Lordships that the judgment appealed from be reversed, and that the respondents do pay to the appellants the costs both here and below.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

I dissent very respectfully from the judgments of the majority of the Court of Appeal, and I agree entirely with the Master of the Rolls.

It is said that there is no decision one way or the other. It is quite true that there is no reported case in which the precise question discussed in the judgments under review has been raised and determined, and it may be that Collins L.J. is right in thinking that there is no dictum in which that question has been dealt with pointedly and advisedly. But there is a stream of authority all tending in one direction, which it is impossible, I think, to gainsay or resist, and which has been treated as conclusive by text-writers of acknowledged eminence both in this country and in America. And when your Lordships are told that there is no actual decision, nor even any carefully considered expression of opinion in favour of the view which the Master of the Rolls took to be settled law, I cannot help recalling the observation of a great judge: "The clearer a thing is," said James L.J., "the more difficult it is to find any express authority or any dictum exactly to the point." (1)

My Lords, I will not trouble you by going through the roll of cases bearing upon the question. It would be impossible, I think, with advantage to add anything to the very able and exhaustive review of the Master of the Rolls. I will only say

(1) (1875) L. R. 10 Ch. 526.

H. L. (E.) 1901

KEIGHLEY, MAXSTED & Co. v. DURANT.

Lord Macnaghten.

a few words in reference to the two grounds on which his conclusion is challenged by Collins L.J. Having satisfied himself that the case was not governed by authority, the learned Lord Justice ends his judgment by declaring that he was bound to decide in accordance with what he regarded to be "principle and common sense."

In appealing to common sense, I do not for a moment suppose that Collins L.J. meant to intimate that the conclusion at which he had arrived, believing himself to be untrammelled by authority, was a self-evident proposition which ought to command the assent of all sensible persons. Admittedly, Lord Cairns and Lord Esher, both sensible persons I should say, took the other view. I rather suppose that the learned Lord Justice meant to appeal to considerations of convenience. But it is difficult to understand how this new departure, if it be a new departure, can be required by any consideration of that sort, seeing that in all these years the question has never before presented itself for decision but once, and then the case was decided on other grounds.

With all deference, I much doubt whether the decision under appeal is in accordance with good sense, whatever that expression means. Still less do I think it is in accordance with principle.

As a general rule, only persons who are parties to a contract, acting either by themselves or by an authorized agent, can sue or be sued on the contract. A stranger cannot enforce the contract, nor can it be enforced against a stranger. That is the rule; but there are exceptions. The most remarkable exception, I think, results from the doctrine of ratification as established in English law. That doctrine is thus stated by Tindal C.J. in *Wilson* v. *Tumman* (1): "That an act done, *for another*, by a person, not assuming to act for himself, but for such other person, though without any precedent authority whatever, becomes the act of the principal, if subsequently ratified by him, is the known and well-established rule of law. In that case the principal is bound by the act, whether it be for his detriment or his advantage, and whether it be founded

(1) (1843) 6 M. & G. at p. 242.

on a tort or on a contract, to the same effect as by, and with all the consequences which follow from, the same act done by his *previous* authority." And so by a wholesome and convenient fiction, a person ratifying the act of another, who, without authority, has made a contract openly and avowedly on his behalf, is deemed to be, though in fact he was not, a party to the contract. Does the fiction cover the case of a person who makes no avowal at all, but assumes to act for himself and for no one else? If Tindal C.J.'s statement of the law is accurate, it would seem to exclude the case of a person who may intend to act for another, but at the same time keeps his intention locked up in his own breast; for it cannot be said that a person who so conducts himself does assume to act for anybody but himself. But ought the doctrine of ratification to be extended to such a case? On principle I should say certainly not. It is, I think, a well-established principle in English law that civil obligations are not to be created by, or founded upon, undisclosed intentions. That is a very old principle. Lord Blackburn, enforcing it in the case of *Brogden* v. *Metropolitan Ry. Co.* (1), traces it back to the year-books of Edward IV. (17 Edw. 4, 2, pl. 2) and to a quaint judgment of Brian C.J.: "It is common learning," said that Chief Justice, who was a great authority in those days, "that the thought of a man is not triable, for the Devil has not knowledge of man's thoughts." (2) Sir E. Fry quotes the same observation in his work on Specific Performance, s. 295, p. 133, 3rd ed. It is, I think, a sound maxim—at least, in its legal aspect: and in my opinion it is not to be put aside or disregarded merely because it may be that, in a case like the present, no injustice might be done to the actual parties to the contract by giving effect to the undisclosed intentions of a would-be agent.

My Lords, I have nothing more to add on the question of principle. But I should like to say a word or two about the case of *Bird* v. *Brown* (3), on which Collins L.J. seems to place his

(1) (1877) 2 App. Cas. at p. 692.

(2) In the original thus: "comen erudition est q̃ l'entent d'un home ne serr̄ trie, car le Diable n'ad conusance de l'entent de home."

(3) (1850) 4 Ex. 786; 19 L. J. (N.S.) Ex. 154; 14 Jur. 132.

H. L. (E.) 1901 KEIGHLEY, MAXSTED & Co. v. DURANT. Lord Macnaghten.

chief reliance. The case is instructive, I think, and useful, because it tends to shake one's confidence in the infallibility of reports, which always seem to carry the more weight the less opportunity there is of testing their accuracy. Why should an obscure report be taken for gospel merely because it is old? *Bird* v. *Brown* (1) was heard by four judges. Only one judgment was given. The Exchequer Reports attribute the judgment to Rolfe B. The *Law Journal* ascribes it to Parke B. The *Jurist* puts it in the mouth of Pollock C.B. No one gives it to the fourth judge; but then there were only three sets of reports current at the time. The *Weekly Reporter* did not begin till later.

The passage in the Exchequer Reports on which the learned Lord Justice relies begins with these words: "If A. B., unauthorized by me, makes a contract on my behalf with J. S., which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me, and when I afterwards agreed to admit that such was the case, J. S. is precisely in the condition in which he meant to be." So far no exception can be taken to the language of the learned judge, whoever he was. Then follows this sentence, on which Collins L.J. lays a stress, denoted by italics, in his printed judgment: "or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had against A. B." Now, I cannot understand that. The assumption is that A. B., unauthorized by me, has made a contract on my behalf with J. S. Why J. S. should not believe that A. B. was acting for me, when A. B. said he was, I do not understand, nor can I see why his want of belief should give him a right to sue A. B. as principal when the contract was made on the representation that A. B. was not principal. The sentence reads like an irrelevant gloss which has crept into the text. I think there must be some mistake somewhere, and it is a consolation to one who is

(1) 4 Ex. 786; 19 L. J. (N.S.) Ex. 154; 14 Jur. 132.

greatly puzzled by the passage to find that it does not occur in the report of the case in the *Law Journal*.

I think the appeal must be allowed.

LORD SHAND. My Lords, I am also of opinion that the judgment of the Court of Appeal should be reversed, and the respondent's action dismissed; but as your Lordships' opinions deal so exhaustively with the grounds of judgment on which the decision of the case depends, I propose to make only a very few observations.

It may be assumed that Roberts, in the contract he made with the respondents, intended to buy, and did buy, on the joint account of himself and the appellants, hoping and expecting that the appellants would, when informed of the terms of his purchase, ratify or adopt the transaction as on joint account. The evidence of this is certainly meagre and unsatisfactory, and involves, as I think, the admission of the entry made in Roberts's book, to which the appellants were no parties, and which was not evidence of contract against them. But at the utmost the respondents can only plead that he has proved by his own testimony that in buying he did so on the joint account, in the hope and expectation that the appellants would adopt or ratify the transaction.

On the other hand, it is clear that Roberts made no suggestion that he was acting for any one but himself, or even that he had hope or expectation that the appellants would be parties to the contract. The contract was made avowedly for himself alone, and not on the statement that he acted on behalf of any principal, or joint contractor, or proposed joint contractor with himself. And it is equally clear that he had no authority from the appellants to make any contract for them, or to make any contract in which they would be interested, for he agreed to pay a price which was in excess of that which the appellants were prepared to give. It is to be further noted that it cannot be said or suggested that the appellants, by any communication with the respondents, or by their conduct in relation to the respondents by any dealing with them, ratified or adopted their contract with Roberts, so as in a question with them to

H. L. (E.) 1901

KEIGHLEY, MAXSTED & Co. v. DURANT.

Lord Shand.

entitle the respondents on any such ground to maintain that the appellants had become liable on contract to them.

The question which arises on this state of the facts is whether, where a person who has avowedly made a contract for himself (1.) without a suggestion that he is acting to any extent for another (an undisclosed principal), and (2.) without any authority to act for another, can effectually bind a third party as principal, or as a joint obligant with himself, to the person with whom he contracted, by the fact that in his own mind merely he made a contract in the hope and expectation that his contract would be ratified or shared by the person as to whom he entertained that hope and expectation. I am clearly of opinion, with all respect to the majority of the Court of Appeal, that he cannot. The only contract actually made is by the person himself and for himself, and it seems to me to be conclusive against the argument for the respondents, that if their reasoning were sound it would be in his power, on an averment of what was passing in his own mind, to make the contract afterwards either one for himself only, as in fact it was, or one affecting or binding on another as a contracting party, even although he had no authority for this. The result would be to give one of two contracting parties in his option, merely from what was passing in his own mind and not disclosed, the power of saying the contract was his alone, or a contract in which others were bound with him. That, I think, he certainly cannot do in any case where he had no authority, when he made the contract, to bind any one but himself.

I have only to add that, for the reasons stated by my noble and learned friend Lord Robertson, I do not think the Roman law gives any support to the judgment of the Appeal Court.

LORD JAMES OF HEREFORD. My Lords, the facts in this case are not in dispute and I do not purpose referring to them in detail. The grounds upon which I have arrived at the conclusion that the judgment of the Court of Appeal should be reversed can be shortly stated.

Roberts, the so-called agent, entered into a contract with

the respondents for the purchase of two quantities of wheat. When doing so he had no principal—he made the contract for himself alone. The cause of action in this case is founded upon the statement made by Roberts, that at the time he made the contract he had mentally formed the intention to offer to the appellants the option of ratifying the contract and becoming parties to it. But no notice of this intention was given to the respondents: they contracted with Roberts alone, and knew no one else. They knew of no disclosed principal other than Roberts, and there was no undisclosed principal—no such person existed. But the day after Roberts had made the contract for himself he met the agent for the appellants, who agreed to share the contract with Roberts.

The question is, Does this latter agreement amount to a ratification of the contract between Roberts and the respondents? In my judgment, it does not. Common sense and authority are alike opposed to it.

Doubtless a person can confirm and ratify a contract which was in fact made on his behalf. But an undisclosed principal must exist at the time of the contract. He cannot be brought into life as a principal after the contract has been made without any recognition of his existence. No doubt a third person, by agreement with one of the principals, may, as between those two persons, take an interest in the contract; but that subsidiary contract does not create any privity between the third person and the other principal to the original contract. To establish that a man's thoughts, unexpressed and unrecorded, can form the basis of a contract so as to bind other persons and make them liable on a contract they never made with persons they never heard of, seems a somewhat difficult task. Hitherto a man's untold thoughts have been regarded to be of a merely nominal value, and the offers generally made for them certainly do not represent large sums of money. If the judgment of the majority of the Court of Appeal be right, these hidden thoughts may represent very large sums of money.

An interesting academic discussion took place at the bar for the purpose of discovering the effect of certain passages to be found in a portion of the civil law. Whatever the effect of

H. L. (E.) 1901

KEIGHLEY, MAXSTED & Co. v. DURANT.

Lord James of Hereford.

these quotations from the Digest may be, they cannot do more than throw light upon the meaning of doubtful passages in our own law, and I cannot discover that there are doubts requiring solution in the law of this country affecting this case. The learned Master of the Rolls has in his judgment very laboriously and clearly traced the authorities bearing upon the subject of ratification.

In the case of *Saunderson* v. *Griffiths* (1) Holroyd J. I think very correctly stated the following proposition: "It was said, however, that A. at a subsequent time assented to the agreement, and that such subsequent assent made it his agreement ab initio. There might have been weight in that argument if the agent, when he made the agreement, had professed to have authority to act for A., because then the subsequent ratification would have been a recognition of the authority which the agent assumed to have when he made the agreement. But here A. never previously authorized the agent to make the agreement on his behalf, nor is he named as a party for whom the latter professed to act."

This judgment, delivered more than seventy years ago, has been followed by many most eminent judges in the cases quoted by the Master of the Rolls in his judgment, and placed before your Lordships by counsel at the bar. Fully accepting the principles laid down by Holroyd J., I concur in the views already expressed by your Lordships, that they should be applied to this case, and that, therefore, the judgment of the majority of the Court of Appeal is erroneous and should be reversed.

LORD DAVEY. My Lords, the facts necessary to raise the question of law on which the learned judges have differed may be thus stated: Roberts made a contract in his own name to purchase a large quantity of wheat from Durant & Co., the present respondents. Roberts bought on his own account, and without any authority from the appellants to buy the wheat on joint account with them, but (it may be assumed for the purpose of the present judgment) intending that the appellants

(1) (1826) 5 B. & C. 909.

should have the benefit of the contract on joint account with himself, if they chose to accept it, and hoping and expecting that they would do so. The appellants did afterwards agree with Roberts to take to the purchase on joint account with him. Roberts was unable to fulfil his contract, and thereupon the respondent sued the appellants as undisclosed principals. At the close of the plaintiffs' case the learned counsel for the appellants submitted that there was no case, and, after some argument, Day J. gave judgment for the appellants, holding that there had been a failure to prove any ratification by them —meaning, as appears from what he had previously said, that no ratification was legally possible in the circumstances.

The question of law, therefore, is, whether a contract made by a man purporting and professing to act on his own behalf alone, and not on behalf of a principal, but having an undisclosed intention to give the benefit of the contract to a third party, can be ratified by that third party, so as to render him able to sue or liable to be sued on the contract. In the course of his judgment Collins L.J. says that the point has never been actually decided, though he admits there are numerous dicta upon it which have become the foundation of statements in text-books more or less adverse to the present respondent's contention, and he says that the question must now be determined on principle.

The learned Lord Justice does not cite a single judicial statement of the doctrine of ratification, or any single statement of it by text-writers, which is in favour of his view. So far as authority is concerned, he is driven to rely upon some words attributed in the Exchequer Reports to Lord Cranworth (then Rolfe B.) in *Bird* v. *Brown* (1) and a case of *Soames* v. *Spencer*. (2)

In *Bird* v. *Brown* (1) Lord Cranworth stated the general doctrine thus: "If A. B., unauthorized by me, makes a contract on my behalf with J. S. which I afterwards recognise and adopt, there is no difficulty in dealing with it as having been originally made by my authority. J. S. entered into the contract on the understanding that he was dealing with me,

(1) 4 Ex. 786; 19 L. J. (N.S.) (Ex.) 154.

(2) (1822) 1 D. & R. 32; 24 R. R. 631.

H. L. (E.) 1901 KEIGHLEY, MAXSTED & Co. v. DURANT. Lord Davey.

and when I afterwards agree to admit that such was the case, J. S. is precisely in the condition in which he meant to be." The statement of the doctrine is, so far, entirely in favour of the appellants' contention; but Lord Cranworth is reported to have added: "or if he did not believe A. B. to be acting for me, his condition is not altered by my adoption of the agency, for he may sue A. B. as principal at his option, and has the same equities against me if I sue which he would have had against A. B." These are the words relied on by the Lord Justice. They are not to be found in the report of the case in the *Law Journal*, where the judgment is attributed to Parke B. Lord Cranworth, if he was the author of these words, or if the words were really used, may have been thinking of the class of cases where a person contracts professedly on behalf of a principal but without naming him (as was said by Willes J. in *Watson* v. *Swann* (1) and see *Lyell* v. *Kennedy* (2)). This interpretation would satisfy his language, or he may have overlooked the point now in question; I do not know. But whatever Lord Cranworth may have said or intended, the words relied on are not sufficient to raise a doubt in my mind as to the accuracy of the statement of the law by other learned judges.

The case of *Soames* v. *Spencer* (3) may perhaps be explained on the principle that fraud will not be presumed, and therefore a man who assumes to sell another person's property really professes to be acting for the true owner. But, however this may be, the point now before your Lordships does not appear to have been raised or argued.

On the other hand, the Master of the Rolls has cited a large number of cases, extending over a period of seventy years or more, and containing the opinions of such judges as Lord Wensleydale, Tindal C.J., Erle C.J., Willes J., and Lord Bowen. These eminent persons all state the law one way. I refer in particular to *Vere* v. *Ashby* (4); *Wilson* v. *Tumman* (5); *Watson* v. *Swann* (1); *Falcke* v. *Scottish Imperial Insurance Co.* (6)

(1) (1862) 11 C. B. (N.S.) 756.
(2) (1889) 14 App. Cas. 437, at p. 456.
(3) 1 D. & R. 32; 24 R. R. 631.
(4) (1829) 10 B. & C. 298; 34 R. R. 408.
(5) 6 Man. & G. 236.
(6) (1886) 34 Ch. D. 234.

I do not think that the propositions of law to be found in these cases can be brushed aside as mere dicta. *Watson* v. *Swann* (1), for example, was an action upon a policy of insurance entered into by one John Smith in his own name. Erle C.J. says: "It is clear law that no one can sue upon a contract unless it has been made by him, or has been made by an agent professing to act for him, and whose act has been ratified by him. Now, here the contract was not made by the plaintiff, nor did it purport to be made on his behalf; it purported to be made by Smith on his own behalf." Willes J. adds: "It is not necessary that he should be named, but there must be such a description of him as shall amount to a reasonable designation of the person intended to be bound by the contract."

Story on Agency and Kent's Commentaries were also referred to. Sect. 251A of the former work contains a very full statement of the doctrine, and shews that the learned author understood the law in the same way as the learned judges already quoted or referred to. I think Mr. Carver successfully shewed that s. 251A is in the language of Story himself. To these authorities should be added the learned note of Mr. Serjeant Manning to the case of *Wilson* v. *Tumman*. (2)

The weight of authority is therefore against the opinion of the learned Lords Justices, and I may be permitted to add that an examination of the cases has confirmed my own previous impression of what the law is upon the point in question. It appears from a note in Smith's Leading Cases to *Armory* v. *Delamirie* (3) that the point now taken was raised in an unreported case of *Matheson* v. *Kilburn*, and that Lord Cairns and Brett L.J. (Cockburn C.J. dissenting) were of opinion that a contract made by one on his own behalf, though intending to buy on behalf of a third person but without authority from him, was incapable of ratification by that third person. It is, however, stated that the case went off on the failure to prove the alleged intention.

(1) 11 C. B. (N.S.) 756. (2) 6 Man. & G. 236, at p. 239.
(3) 2 Sm. L. C. 10th ed. p. 349.

H. L. (E.) 1901

KEIGHLEY, MAXSTED & Co. v. DURANT.

Lord Davey.

I might content myself with these grounds for my judgment; but Collins L.J. has given reasons for his opinion that this case ought to be decided otherwise on principle and (to use his own expression) common sense, and has also referred to the Roman law on the subject. I will out of respect to him shortly state my views upon this portion of his judgment. The argument seems to be that as the law permits an undisclosed principal, on whose behalf a contract has been made, to sue and be sued on the contract, and as the effect of ratification is equivalent to a previous mandate, a person who ratifies a contract intended but not expressed to be made on his behalf is in the same position as any other undisclosed principal. Further, it is said that whether the intention of the contractor be expressed or not, its existence is mere matter of evidence, and once it is proved the conclusion ought to follow. Romer L.J. held that on principle it ought to be held that ratification (in the case before the Court) is possible, and that to hold the contrary would be to establish an anomaly in the law, and moreover a useless one. My Lords, I cannot agree. There is a wide difference between an agency existing at the date of the contract which is susceptible of proof, and a repudiation of which by the agent would be fraudulent, and an intention locked up in the mind of the contractor, which he may either abandon or act on at his own pleasure, and the ascertainment of which involves an inquiry into the state of his mind at the date of the contract. Where the intention to contract on behalf of another is expressed in the contract, it passes from the region of speculation into that of fact, and becomes irrevocable. In what sense, it may be asked, does a man contract for another, when it depends on his own will whether he will give that other the benefit of the contract or not? In the next place, the rule which permits an undisclosed principal to sue and be sued on a contract to which he is not a party, though well settled, is itself an anomaly, and to extend it to the case of a person who accepts the benefit of an undisclosed intention of a party to the contract would, in my opinion, be adding another anomaly to the law, and not correcting an anomaly.

The passages in the Digest cited by the Lord Justice are from Dig. III. tit. 5, De negotiis gestis. If the whole of the title be read, it does not appear to me to bear out the meaning placed upon it by the Lord Justice, and I can find no warrant for the gloss put by him on the words meâ contemplatione and meo nomine. I need not, however, pursue this topic, because I believe that one of your Lordships will discuss it with a fuller knowledge of Roman law than I can command.

I am therefore of opinion that the appeal should be allowed.

LORD BRAMPTON (after stating the facts). My Lords, it was not suggested that in any of the several telegrams in which the contract was contained, or in any other way, Durant was made aware, or that Roberts ever hinted to him, that in making it he was acting by the authority, or on behalf, of an undisclosed principal. Had he so made it—though at that time no authority from Keighleys was then in existence—Keighleys might have ratified and adopted it, and having done so both they and Durant would have been as responsible upon it, each to the other, as if Keighleys had been a party to it from the beginning; but as this contract was clearly not so made, but was a simple written contract between Durant, the vendor, and Roberts, acting apparently for himself only, as vendee, it could not be so ratified by Keighleys, for there was no contract open for them to ratify; and it could not have been adopted by them, for after a contract has been finally concluded between two persons it cannot be altered so as to make a third person liable upon it. If this is desired, it must be done through the medium of a new contract.

But it is said for the plaintiff that when Roberts made his contract he had within his mind an intention, though he never communicated or disclosed it to anybody, to make it on the joint account of Keighleys and himself, and that such secret intention was quite sufficient to empower Keighleys to ratify or adopt it. I cannot assent to this view. I have always been under the impression that a concurrence of intention was an essential element of a contract. Nobody can doubt that it is essential in making an agreement to ascertain who are then

H. L. (E.) 1901 KEIGHLEY, MAXSTED & Co. v. DURANT. Lord Brampton.

intended to be made parties to it. It is impossible in construing a contract to give any weight to such a reserved intention as that suggested in this case; to do so would be to open wide a doorway to fraud and deception; and it would necessitate the addition of the doubtful science of thought-reading to the requirements of a mercantile education. I reject, therefore, this doctrine of mental reservation, and strip from the case the element of secret intention.

The case then is reduced to this: that there is a contract between Roberts and Durant simply, to which it was never avowedly contemplated that Keighleys should be parties. Neither Keighleys nor Durant could make the former liable by adoption or ratification of a contract to which, when it was concluded, it was not in contemplation of themselves or Durant that they should or could be so. This action, therefore, which is based on a contract to which Keighleys were not parties, must fail.

I say nothing about any new contract which it was open for the parties, or any of them, to have made if they had so thought fit—a new contract between themselves. It may or may not be that some contract between Roberts and Keighleys might have been formulated out of the interview with Wright on May 12 at Manchester. I am now dealing only with the contract made on the 11th between Roberts and Durant, to which, in my opinion, the appellants (Keighleys) could not make themselves, or be made by Durant, parties.

I will not detain your Lordships by again referring to the numerous cases cited at the bar, nor to those so fully discussed by the Court of Appeal; in addition to these, I desire only to refer to that of *Kelner* v. *Baxter* (1), decided by Erle C.J. and Willes, Byles, and Keating JJ. I agree in the judgment of the present Master of the Rolls in the Court of Appeal. It follows that, with all respect to the opinions expressed by the majority of that Court, I cannot concur in their views. In my opinion, therefore, the judgment of the Court of Appeal should be reversed, the judgment of Day J. restored, and this appeal allowed with costs.

(1) (1866) L. R. 2 C. P. 174.

LORD ROBERTSON. My Lords, after so much has been said in which I agree, I shall confine my observations to the briefest statement of my view of the case generally, and a few remarks on the inferences which have been drawn from certain texts of the civil law.

With the Master of the Rolls, and in his words, I hold that, "unless the contract made by the unauthorized agent purports or professes . . . to have been entered into on behalf of another . . . . then that contract made by the unauthorized agent was not capable of being ratified by a stranger to it." To speak of the "purporting or professing" as if this were one condition, more or less, of ratification, seems to me to be rather an understatement. All are agreed that there must be some special relation between the ratifier and the contract other than and antecedent to his claiming the contract. To hold otherwise would be to admit extravagant results. It seems to me that the whole hypothesis of ratification is, that the ultimate ratifier is already in appearance the contractor, and that by ratifying he holds as done for him what already bore, purported or professed to be, done for him. There is, as it seems to me, no room for ratification (unless all the world may ratify) until the credit of another than the agent has been pledged to the third party. Whether the unauthorized agent be marked out as an agent by what he says, or by what he wears, is, of course, a mere matter of circumstance and of evidence; but an agent he must be known to be, and as agent he must act. On the other hand, the only theory consistent with the respondents' argument is, that the essential condition is that the person making the contract did so in a state of mind which may more accurately be described as hope than intention, that the person who ex hypothesi ultimately "ratifies" would "ratify." The difficulty of stating this theory, and the difficulty of working it, having regard to its basis being unexpressed and very likely half-formed expectations, are not indeed conclusive objections, but they challenge scrutiny of supposed origin of the theory. And this leads me to what Collins L.J. has said about the civil law.

Now it is remarkable that, the question in hand being the

H. L. (E.) 1901 KEIGHLEY, MAXSTED & Co. v. DURANT. Lord Robertson.

ratification of contracts, nothing that is cited from the civil law relates to contracts. The passage first and mainly relied on by Collins L.J. relates to the exaction of a debt by a negotiorum gestor. Now I agree that in the text importance is attached to the contemplatio with which the negotiorum gestor had acted. But, in order to ascertain the relevancy of this element, it is necessary to grasp the thesis of the long discussion of which the passage cited is a mere episode. The question being discussed is, In what cases shall a person interfering in the affairs of an absent man have an action (for reimbursement or the like) against that man? And one of the conditions of this purely equitable remedy (allowed by the liberality of the later Roman law) is that the intervention shall have been really a friendly intervention in the interest of the absent dominus, and not a selfish intervention truly in the interest of the intervener himself or of a third party. In that question the contemplatio is of essential relevancy, while the avowal of it is of no relevancy at all except as evidence. Accordingly, in the case of Seius, the negotiorum gestor has his remedy because, although it turns out that the true creditor of the man who was made to pay was someone else altogether, yet the intervention was motived by regard to the interest of the other, who made it his own by ratifying. In this case, as throughout this part of the Digest, the argument is as to the relations between the negotiorum gestor and the absentee, not as to the relations between the negotiorum gestor and the third party, and there is, therefore, no occasion for any analysis of ratification. In the passage cited, the act ratified not having been a contract, there is not even (as I view it) an incidental elucidation of the present controversy; but it is difficult to suppose that the debtor paid except to a professed agent of the supposed dominus, and we know that as matter of practice a negotiorum gestor had to give security ratam rem dominum habiturum. The other texts from the Digest cited by Collins L.J. relate to torts, and the juridical considerations which ought to determine liability or non-liability for a tort acceded to ex post facto by the person in whose interest it has been committed are not the same as apply to a man being

introduced into a contract with a third party, although the word ratification and its Latin equivalents may with propriety be applied to describe his accession in the one case as well as in the other. But again I must add that I fail to find in any of those passages any discussion of the question now agitated, or anything implying that the person injured did not know that the wrong was done in the service of the person who ultimately ratifies.

On these grounds I must respectfully decline to hold that the civil law supports the judgment appealed against.

LORD LINDLEY. My Lords, I do not propose to trouble the House by stating the facts or by examining in detail the numerous authorities cited in the course of the argument. I propose to confine my observations to what appear to me to be the real difficulties in the case, and to the legal doctrines involved in it.

So much turns on the position of undisclosed principals that I will first say a few words about them.

The explanation of the doctrine that an undisclosed principal can sue and be sued on a contract made in the name of another person with his authority is, that the contract is in truth, although not in form, that of the undisclosed principal himself. Both the principal and the authority exist when the contract is made; and the person who makes it for him is only the instrument by which the principal acts. In allowing him to sue and be sued upon it, effect is given, so far as he is concerned, to what is true in fact, although that truth may not have been known to the other contracting party.

At the same time, as a contract is constituted by the concurrence of two or more persons and by their agreement to the same terms, there is an anomaly in holding one person bound to another of whom he knows nothing and with whom he did not, in fact, intend to contract. But middlemen, through whom contracts are made, are common and useful in business transactions, and in the great mass of contracts it is a matter of indifference to either party whether there is an undisclosed principal or not. If he exists it is, to say the least, extremely

H. L. (E.) 1901 KEIGHLEY, MAXSTED & Co. v. DURANT. Lord Lindley.

convenient that he should be able to sue and be sued as a principal, and he is only allowed to do so upon terms which exclude injustice.

The reasons upon which a real principal not disclosed can sue or be sued on a contract made on his behalf by an agent acting with his authority have no application to contracts made by one person for another, but without any authority from him. Some other reason must be found to permit a person to sue or be sued upon a contract not entered into by him through an agent or otherwise.

The principle relied on, and the only principle which by our law can be invoked with any chance of success, is that known as ratification, by which an approval of what has been done is sometimes treated as equivalent to a previous authority to do it. The mere statement of the general nature of what is meant by ratification shews that it rests on a fiction. Where a man acts with an authority conferred upon him, no fiction is introduced; but where a man acts without authority and an authority is imputed to him a fiction is introduced, and care must be taken not to treat this fiction as fact.

It is not necessary to write a treatise on the doctrine of ratification in order to dispose of this case. Historically that doctrine is no doubt derived from the Roman law; but it has been extended and developed in this country conformably to our own legal principles and to meet our own commercial necessities; and it is to our own decisions rather than to the Digest and commentaries upon it that English Courts must look for guidance. It is well known that in matters of contract we pay far less attention judicially to unexpressed intentions than is paid to them in other countries which have followed the Roman law more closely than we have: see *Byrne* v. *Van Tienhoven*. (1)

Roberts' evidence, on which the case turns, may be summed up by saying that it amounts to one or other of the two following statements, namely: (1.) That he intended to buy, and did buy, as a principal, hoping and expecting that Keighley, Maxsted & Co. would afterwards join him in his speculation;

(1) (1880) 5 C. P. D. 344.

or (2.) That he intended to buy, and did buy, on the joint account of himself and Keighley, Maxsted & Co. as principals, hoping and expecting that they would, when informed of what he had done, ratify the transaction.

The first of these views of his evidence will not avail the plaintiffs; for in this view Roberts' contract, not having been made for Keighley, Maxsted & Co. as possible principals, will not admit of ratification by them. The plaintiffs' counsel did not contend that it would, and they did not press the first view in argument.

The second view is not open to this objection, and ought to be left to a jury if there is any evidence that Roberts not only intended to buy, but did buy, on the joint account of himself and Keighley, Maxsted & Co. He swears that he did; so far as his intention is concerned, I will give him credit for what he says, but I am unable to discover any evidence of anything more.

Had Keighley, Maxsted & Co. authorized Roberts to buy for them there would have been a contract in fact, although Durant & Co. did not know of them and did not intend to sell to them. This is, no doubt, an anomaly, as already pointed out; but there is a reality behind it. To apply the same sort of reasoning to a different state of facts from which the reality is absent is to go further than any existing authority, and to extend a fiction further than is required by those necessities or conveniences of trade which led to its introduction.

The doctrine of ratification as hitherto applied in this country to contracts has always, I believe, in fact given effect in substance to the real intentions of both contracting parties at the time of the contract, as shewn by their language or conduct. It has never yet been extended to other cases. The decision appealed from extends it very materially, and I can find no warrant or necessity for the extension.

I have examined all the authorities referred to in the judgments of the Court of Appeal, and those cited by counsel in this House, and with two apparent exceptions they are all, in my opinion, adverse to the plaintiffs. One exception is the

H. L. (E.) 1901 KEIGHLEY, MAXSTED & Co. v. DURANT. Lord Lindley.

passage in *Bird* v. *Brown* (1), which has been already commented on, and which I do not clearly understand. The other apparent exception is *Soames* v. *Spencer* (2), which, when examined, does not really help the plaintiffs. There, one of two co-owners of oil sold the oil to the defendants. The buyers—i.e., the defendants—apparently did not know that the oil did not wholly belong to the seller. When informed that there was a co-owner who objected to the bargain, the defendants insisted that he was bound by it, and he acquiesced in their view. Both parties treated the contract as if made between both owners, as sellers, and the buyers. Afterwards, when sued by both co-owners for not accepting the oil, the defendants—i.e., the buyers—changed their tactics, and contended that there was no ratification, and no contract in writing, to satisfy the Statute of Frauds. It is plain from the judgment of Abbott C.J. that the conduct of the defendants themselves removed any real difficulty as regards ratification which otherwise might have arisen.

It may be that if one of several co-owners of a chattel sells it, without the authority of his co-owners, to a person who believes he is dealing with the sole owner of the property sold, the transaction can be ratified by the undisclosed co-owners, and that they can then sue or be sued on the contract as undisclosed principals. Their interest in the property may justify this view. In *Soames* v. *Spencer* (2) it was assumed rather than decided that ratification in such a case is possible, and I am far from saying that it is not. The co-ownership shews that the seller, if acting honestly, must in fact have been acting for his co-owners as well as for himself. His intention is supplemented by a fact which completes the proof of what is necessary. In the present case there is no co-ownership, which was the foundation of the decision in *Soames* v. *Spencer* (2), and consequently the decision when carefully looked at is not really an authority for the plaintiffs.

That ratification when it exists is equivalent to a previous authority is true enough (subject to some exceptions which need not be referred to). But, before the one expression can be

(1) 4 Ex. 786. (2) 1 D. & R. 32; 24 R. R. 631.

substituted for the other, care must be taken that ratification is established.

It was strongly contended that there was no reason why the doctrine of ratification should not apply to undisclosed principals in general, and that no one could be injured by it if it were so applied. I am not convinced of this. But in this case there is no evidence in existence that, at the time when Roberts made his contract, he was in fact acting, as distinguished from intending to act, for the defendants as possible principals, and the decision appealed from, if affirmed, would introduce a very dangerous doctrine. It would enable one person to make a contract between two others by creating a principal and saying what his own undisclosed intentions were, and these could not be tested.

To return to the question whether there was any evidence proper to be left to the jury which would justify a verdict in favour of the plaintiffs against Keighley, Maxsted & Co., I am of opinion that there was none. There was no evidence of any purchase by Roberts for Keighley, Maxsted & Co., as expected principals, except (1.) what he says of his own intention; (2.) what he says about the telegram he afterwards sent to Keighley, Maxsted & Co.; and (3) his own entry in his own book. Assuming all this to be admissible for any purpose, what Roberts intended was never disclosed to Durant & Co., and cannot be inferred from the nature of the transaction itself. His intention, therefore, cannot be allowed to affect the rights of the parties. What he afterwards did, unknown to Durant & Co., cannot in any way affect their position. The appeal, therefore, in my opinion, ought to be allowed with costs here and below.

Order appealed from reversed and judgment of Day J. restored, with costs here and below.

Lords' Journals, May 20, 1901.

Solicitors: *Chester, Broome & Griffithes, for Holden, Sons & Hodgson, Hull; Thorowgood, Tabor & Hardcastle.*

[HOUSE OF LORDS.]

H. L. (D.) 1901 Feb. 26.

JAMES WILLIAM BUTCHART . . APPELLANT;

AND

ALICE MARTHA BUTCHART . . . RESPONDENT.

ERNEST EDWARD HILL . . . . CO-RESPONDENT.

Divorce—New Trial—Appeal to House of Lords—Competency—Supreme Court of Judicature Act, 1881 (44 & 45 *Vict.* c. 68), s. 9.

By s. 9 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), ". . . . The decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes, ... shall be final except where the decision either is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, ... or is upon a question of law on which the Court of Appeal give leave to appeal, and, save as aforesaid, no appeal shall lie to the House of Lords under the said Acts."

Where the Divorce Court has granted a decree nisi after a trial before a jury, and the Court of Appeal has ordered a new trial, an appeal lies to the House of Lords against the order granting a new trial.

APPEAL against a judgment of the Court of Appeal dated February 1, 1900, ordering that the issues be sent back to the Divorce Court for a new trial.

The appellant J. W. Butchart and the respondent A. M. Butchart were married in 1886. The parties temporarily separated in 1893, and finally by deed of separation in 1895. There were three children of the marriage. In 1897 the appellant presented a petition against the respondent for a dissolution of marriage on the ground of her adultery with the co-respondent E. E. Hill and with other persons unknown. The respondent denied the alleged adultery, and prayed for a dissolution of marriage by reason of the appellant's cruelty, and by his adultery with a girl named Edith Parker and with other women whose names were unknown. The co-respondent also denied the adultery. The trial came before the President and a common jury, and lasted in all eight days. On March 23, 1899, the parties having agreed to take the verdict of the majority, the jury by

such majority found that the respondent and co-respondent had committed adultery; they also found for the appellant upon the counter-charges brought against him by the respondent. A decree nisi dissolving the marriage was upon the findings of the jury pronounced, and the co-respondent was condemned in the costs of and incidental to the petition.

The respondent and co-respondent gave notices of motion for a new trial, and the Court of Appeal granted the application in both cases, and ordered a new trial of all the issues as to which evidence had been heard before the jury. (1) The appellant did not obtain leave to appeal. The appellant appealed to this House, and the respondent and co-respondent lodged petitions against the competency of that appeal. The matter of the competency of the appeal came before the Appeal Committee, who reserved the question to be argued at the bar.

On the question of competency,

Feb. 22, 25, 26. *Jelf, K.C.* (with him *H. Durley Grazebrook*), for the appellant. This appeal is competent under the words of the exception in s. 9 of the Supreme Court of Judicature Act, 1881. The only reasonable meaning of the section is that in one category of questions you can appeal, and that in the other category the right is conditional. The order of the Court of Appeal is not upon consequential matter, but deals with the dissolution of marriage. The decision of the Court of Appeal granting a new trial necessarily swept away the decree "nisi" for a dissolution of marriage, and therefore the order of the Court of Appeal comes within the category of cases which include the one where the decision is vital, i.e., whether there is to be a dissolution or not. Six months after the decree nisi, if there be no intervention by the Queen's Proctor, the decree nisi becomes final, and the parties can marry again. By the intervention of the Court of Appeal this result has been prevented.

[He was stopped.]

Inderwick, K.C. (with him *John Rooth*), for the respondent. Against the order for a new trial in this case there is no right

(1) *The Times*, March 24, 1899; Feb. 2, 1900.

H. L. (D.) 1901 BUTCHART v. BUTCHART.

of appeal to this House. The Act says it is to be construed with the said previous Acts, and these prior Acts give no right of appeal in such a case as this.

[EARL OF HALSBURY L.C. The question is not a mere question of interlocutory matter or a matter of practice. It touches the dissolution of marriage.]

Bargrave Deane, K.C. (with him *Newton Crane*), for the co-respondent. The effect of the decision of the Court of Appeal is merely to suspend the proceedings. The decree nisi has not been set aside.

THE HOUSE (Earl of Halsbury L.C., and Lords Macnaghten, Shand, Brampton, and Robertson) allowed the appeal to proceed as competent.

On the merits,

Jelf, K.C., and *H. Durley Grazebrook*, for the appellant, then went into the question whether there should be a new trial.

[They cited Lord Penzance in *Scott* v. *Scott* (1), *Solomon* v. *Bitton* (2), and *Metropolitan Ry. Co.* v. *Wright*. (3)]

Inderwick, K.C., and *John Rooth*, for the respondent, and *Bargrave Deane, K.C.*, and *Newton Crane*, for the co-respondent, were not called upon.

EARL OF HALSBURY L.C. The whole trial before the jury was so unsatisfactory, that this House will not take upon itself the responsibility of reversing the decision of the Court of Appeal; the issues therefore go back for a new trial. And as there is to be a new trial, any comment on the evidence by their Lordships might be injurious; I will therefore simply say that the appeal is dismissed.

LORDS MACNAGHTEN, SHAND, BRAMPTON, and ROBERTSON concurred.

Ordered that the orders of the Court of Appeal appealed from be affirmed and the appeal dismissed; the appellant to pay the respondent's

(1) (1863) 3 Sw. & Tr. 319. (2) (1881) 8 Q. B. D. 176.
(3) (1886) 11 App. Cas. 152, 156.

costs of the appeal; the costs of the co-respondent reserved for consideration after the result of the new trial shall have been reported to the House.

H. L. (D.) 1901 BUTCHART v. BUTCHART.

Lords' Journals, February 26, 1901.

Solicitors for appellant: *Mellor, Smith & May, for T. M. Barlow, Cardiff.*

Solicitors for respondent and co-respondent: *Indermaur & Brown, for Dixon & Dixon, Bristol, and W. Bradley, Cardiff.*

[HOUSE OF LORDS.]

(APPEAL COMMITTEE.)

JANET OSBORNE OR M'KINNON . . APPELLANT;

AND

BARCLAY, CURLE & CO. . . . . RESPONDENTS.

H. L. (Sc.) 1901 *March* 29.

Master and Servant—Appeal to the House of Lords from Scotland—Competency—Workmen's Compensation Act, 1897 (60 & 61 *Vict. c.* 37), *Sched. II., s.* 14 (*c*).

By s. 14 (*c*) of the 2nd schedule to the Workmen's Compensation Act, 1897, which applies to Scotland, "Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them, and subject to the declaration that it shall be competent to either party, within the time and in accordance with the conditions prescribed by act of sederunt, to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced":—

Held, that in cases within this enactment no appeal lies to the House of Lords from a decision of the Court of Session.

APPEAL from a decision of the Second Division of the Court of Session, Scotland.

The appellant was Janet Osborne or M'Kinnon, widow of

H. L. (Sc.) 1901

OSBORNE v. BARCLAY, CURLE & Co.

John M'Kinnon, riveter. The respondents were Barclay, Curle & Co., ship-builders and engineers, Whiteinch, Partick, Scotland.

The question was whether the appeal was competent under the 2nd schedule to the Workmen's Compensation Act, 1897, s. 14 (*c*). Under that section a stated case on a question of law was brought up from the Sheriff Court to the Second Division of the Court of Session. The Court of Session, on February 1, 1901, pronounced the following interlocutor: "The Lords having heard counsel for the parties on the stated case, sustain the appeal and answer the first question of law therein stated in the negative: Find it unnecessary to answer the other questions of law therein stated; therefore recall the award of the arbitrator and remit to him to dismiss the claim: Find the appellants (respondents here) entitled to their expenses of the stated case, and remit to the arbitrator to tax the same and report." The effect of this interlocutor was to dismiss the claim of the appellant Janet Osborne, and she appealed to this House. The respondents petitioned the House of Lords that the appeal was incompetent on the ground that the decision of the Court of Session was final and not appealable. The petition was ordered to be argued before the Appeal Committee by one counsel on each side.

1901. March 29. Appeal Committee: present, Earl of Halsbury L.C., and Lords Davey, Morris, Shand, Robertson, and Lindley.

William Campbell, K.C., for the respondents. The appeal is not competent. The procedure on arbitrations is collected in what is called the 2nd schedule to the Workmen's Compensation Act, 1897, and the 14th section deals with the jurisdiction of the Court of Session and how it is to be exercised. In this appeal one of the parties called upon the sheriff as arbitrator to state a case on a question of law. The case for the respondents is simply this: that under the section, which alone gives jurisdiction to the Court of Session to entertain the matter, the judgment of the Court of Session is in expressed

terms declared to be a final one. The scheme is to invoke the method of procedure laid down in s. 52 of the Sheriff Courts (Scotland) Act, 1876. All that section lays down is that it determines certain methods of procedure which are to be applicable to summary proceedings in the Sheriff Court, which are declared by statute not to be subject to review. Therefore the method of procedure, which if left unqualified would have left the whole proceedings in the hands of the sheriff; but there are two savings in the 14th section of the Workmen's Compensation Act which modify the provisions of s. 52 of the Sheriff Courts Act. In the first place, the parties may be represented by any person authorized in writing to appear for them; and then there comes this: "And subject to the declaration that it shall be competent within the time and in accordance with the conditions prescribed by act of sederunt to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division, who may hear and determine the same finally." Thus any question arising under this section of the schedule does not come before the Court of Session under the ordinary procedure of an appeal from the sheriff to the Court of Session, but it comes up under an entirely novel and special jurisdiction—namely, upon a special case presented to the Court by the sheriff acting as arbitrator. This is an entirely novel thing in Scotland. In England it is familiar enough that arbitrators should obtain an opinion of the Court on questions of law; but, so far, such practice is not known in Scotland, this being a novel form of procedure, in which a special case is "submitted to either Division of the Court of Session, who may hear and determine finally." The case for the respondents is that those words mean just what they say: that where the Court of Session takes up the matter and issues a determination, that determination is to be "final"; and further, in the second line of sub-s. (*c*), you get the phrase "determined." The sheriff, acting as arbitrator, may determine a thing: it is not said that he may determine it finally. There is a right of appeal to the Court of Session, given by special case; but then it is laid down that the determination of

H. L. (Sc.) 1901 OSBORNE v. BARCLAY, CURLE & Co.

the Court of Session on the matter is to be final; the force of the expression, "who may hear and determine the same," is that it confers upon the Court of Session a power of jurisdiction which it did not before possess. The Court of Session would have had no power under the common law procedure rules to decide the case unless they were empowered by these words in the schedule. The word "may" would practically be read as "shall." It may be urged against the respondents that appeals under this statute are competent to this House from the Courts of Appeal in England, and that it is somewhat anomalous that a different procedure should be laid down in the sister country, Scotland; but no one who has ever attempted to deal with this statute has thought it necessary to attempt to account for its anomalies. It is sufficient for this case, on the question of procedure, that there are very marked differences of procedure in arbitrations comparing England with Scotland. It must be noticed that the section of the schedule now in question applies entirely to arbitration proceedings before the sheriff in Scotland in his capacity as arbitrator. But in Scotland, as in England, proceedings of this kind are not confined to a county court judge or sheriff acting as arbitrator, but the parties may proceed before a lay arbitrator, who may be a committee or an employer of workmen, or he may be an ordinary arbitrator agreed upon between the two parties. We start, therefore, with this fact. If in Scotland the arbitration proceeded before a lay arbitrator, either a committee or an individual, there is no appeal whatever provided on questions of law. In other words, it is left to the common law of Scotland, which in such cases gives the arbitrator plenary right to go wrong upon his law, provided he does not act corruptly or act ultra vires. In England the schedule is much more liberal on the question of appeal on a matter of law, because the schedule contains s. 4, which is analogous to s. 14. Sect. 4 is as follows: "The Arbitration Act, 1889, shall not apply to any arbitration under this Act; but an arbitrator may, if he thinks fit, submit any question of law for the decision of the county court judge, and the decision of the judge on any question of law either on such submission or in any case where he himself settles the matter

under this Act shall be final, unless within the time and in accordance with the conditions prescribed by Rules of the Supreme Court either party appeals to the Court of Appeal . . . ." The first point upon this s. 4 is that, even where the proceedings are before a lay arbitrator, power is given to him to state a case on a question of law to be decided by the county court judge, and the decision of the county court judge upon such question of law may be appealed to the Court of Appeal, and although it is not said in so many words here, we know that if once it gets to the Court of Appeal it is allowed to be brought on to this House on appeal. Weight is to be attached to the fact that in the English procedure clause you have the word "final" used as meaning finally in the ordinary sense. In the English procedure clause you have a power to submit to a Court of Law questions of law arising on an arbitration even before a lay arbitrator. In Scotland you have no powers of that kind, because s. 4 is expressly declared not to apply to Scotland. Then you have an expressed declaration that the decision of the county court judge in England is to be final, unless an appeal is taken in a certain form. That shews the sense in which the statute uses the word "final." There is this important distinction also between the English clause and the Scottish clause. In the Scottish clause directions are given to the Court of Session that they are "to hear and determine" the question of law "finally." In the English clause no directions at all are given to the English Court of Appeal. It is evidently understood that the English Court of Appeal will deal with the case according to their ordinary procedure, and subject to the ordinary law as to appeal. That is, once the case is within the class of cases coming before the Court of Appeal in England, under s. 4 the Court gives an appeal to the House of Lords.

[LORD DAVEY. There is an express section in the Judicature Act that every order of the Court of Appeal is subject to appeal to the House of Lords unless otherwise expressly excepted.]

Sect. 4 is valuable by way of contrast; but the respondents' argument turns upon the special terms of s. 14, which gives a

H. L. (Sc.) 1901 OSBORNE v. BARCLAY, CURLE & Co.

very limited and novel right of appeal to either party. Sect. 4 applies to both England and Ireland, but it is expressly declared not to apply to Scotland. The respondents would not dispute that if this case had come to the Court of Session in Scotland in virtue of the ordinary appellate jurisdiction from the sheriff to the Court of Session, and if there had been no special direction given to the Court of Session as to how to deal with it, of course it would have been exactly the same as an ordinary appeal from the Court of Session, and appealable to this House as an appellant coming to this House in the ordinary way—that is, that the primâ facie jurisdiction of the Court is not to be held excluded unless that appears from the clear language of the enactment.

[EARL OF HALSBURY L.C. By the circuitous path you have pointed out, a right of appeal is given in the English cases, but there is no presumption of a right of appeal. You must get in some way or other the right of appeal given.]

That is so; and I take it that the way in which the appellant would have to shew that the right of appeal was given would be by shewing that the ordinary jurisdiction of the Court of Session was in some way invoked. The respondents' case is that this is an entirely novel and exceptional power given to the Court of Session "to determine the same," and, accordingly, if you want to see what the Court of Session have power to do, you must look at s. 14, which says that it is "to determine the same finally." On these grounds the Committee is asked to hold that this appeal is incompetent.

Thomas Shaw, K.C., for the appellants. This appeal is competent. The question is one of very great importance, because it shews a very strong contrast in respect to the application of this statute to Scotland and England. If the respondents are right, that there is no right of appeal in this case to this House, such a decision would put the legislation in regard to the two countries on a broad and distinctive line: that on one side of the Tweed we should have a final judgment, and on the other side we should have the extraordinary anomaly which has already occurred in practice, that decisions which are in pari casu with decisions in the Court of Appeal, but which have

been subsequently upset by this House, must remain final in Scotland, although they have by the House of Lords been affirmed to be fundamentally bad law. This result would be productive of a very remarkable and striking anomaly.

[LORD SHAND. Only in the special case where parties proceed to arbitration.]

Yes. The practice under the statute is almost invariably resorted to. In Scotland the Act has been worked constantly, and decisions are coming up constantly. Now, in regard to the language in s. 14, there is the employment of language, "hear and determine finally," which has been long familiar to the Courts in Scotland, and has not been familiar to them in the sense of having an unappealable determination given. In various old decisions in Scotland, in which identical language to the present was employed, and in which the Court held that, notwithstanding that inferior Courts were charged by statute with the hearing and final determination of the cause, the ordinary appeal at law was not excluded in the absence of positive words of exclusion. In *Buchanan* v. *Towart* (1) the Court had to construe these words: "the justices are authorized to hear and finally determine all offences against the Act." It was questioned how far these words gave in such cases a jurisdiction to the justices without appeal to the Court of Session. The Court found that the Act gave no such jurisdiction, and entertained the appeal. In *Anderson* v. *Campbell* (2) a question arose under 9 Anne, c. 11, s. 36, regulating the trade of currier and tanner. The contention there was that the jurisdiction of the Court of Session was not excluded in such cases. The section declared if either party shall find himself "aggrieved or remain unsatisfied in the judgment of the said justices, then he or they shall or may by virtue of this Act complain or appeal to the justices of the peace at the next general quarter sessions for that county, riding or place, who are hereby empowered to summon and examine witnesses upon oath and finally to hear and determine the same." The Court had no doubt on this question of jurisdiction that the decision of the

(1) (1754) Mor. Dict. 7609. (2) (Feb. 28, 1811) 16 Fac. Coll. 207, 208.

H. L. (Sc.) 1901 OSBORNE v. BARCLAY, CURLE & Co.

justices of the peace under the statutes regarding leather—that is, these statutes with regard to curriers and tanners—were not final. The true interpretation which would be put upon the expression "finally determined" would say, We find for over a century this same language has been construed not to exclude the jurisdiction of a Court of review. Further, the appellant founds very strongly upon the absence of words exclusive of an appeal. For instance, in regard to the administration of the Sheriff Courts: to the administration of the practice of debts and recovery: and in regard to local administration, such as roads and bridges, we have a whole series of statutes in which there is an exclusion of the power of review by a superior Court, but it is done in positive and affirmative language. In the Sheriff Courts (Scotland) Act (16 & 17 Vict. c. 80), s. 22, the language is of extraordinary breadth. It is: "It shall not be competent, except as hereinafter specially provided for, to remove from a Sheriff Court or to bring under review of the Court of Session or of the Circuit Court of Justiciary or of any other Court or tribunal whatever by advocation, appeal, suspension, or reduction, or in any other manner or way, any cause not exceeding the value of twenty-five pounds."

[EARL OF HALSBURY L.C. referred to the Act of 1825—Judicature (Scotland) Act (6 Geo. 4, c. 120), s. 40—which made the decision of the Court of Session final as to the facts, but enabled the question of law to come up to the House of Lords.]

Another instance where review is absolutely excluded is the Parochial and Burgh Schools (Scotland) Act (24 & 25 Vict. c. 107), s. 14. The words are: "Which sentence shall be final and not subject to review." There is a variety of expression of the exclusive language, but there it is of the simplest. There the word "final" does not appear to satisfy the minds of the Legislature unless it is accompanied by some language expressive of the exclusion of review. The meaning I give to the word "finally" here is that, so far as the Court of Session was concerned, it had no power to remit the question, it had

no power to decide it partially, it had no power to reserve any question, but it must, so far as it was concerned, end the case. It is a long step from holding that without these words, which are employed universally in legislative enactments with regard to the exclusion of review, the word "finally" being left here to stand alone, that the ordinary right of review which is the right of every litigant in the country should be cut off.

[EARL OF HALSBURY L.C. You must shew a right to appeal. It is a proposition that must be established.]

It is the right of all Scottish subjects to have an appeal to this House. In *Bywater* v. *The Crown* (1) Lord Mansfield pronounced a judgment which settled the question for ever. There had been a decision by a criminal court, and then there was a review at the bar of the House of Lords of the whole functions of the House with regard to Scottish arrangements, and Lord Mansfield delivered a long judgment against the appeal; but he made this observation: "By the Articles of Union the Court of Session and the Court of Justiciary are to all intents and purposes, with all rights, forms, customs, manners, privileges, &c., to remain just as they were before. At the time of the Union it was clear established law that there lay an appeal from the Court of Session to the Parliament of Scotland, and therefore that jurisdiction devolved upon this House from the moment of the Union down to this day, as your Lordships well know; and it has been very beneficial to that part of the United Kingdom. Appeals have regularly been brought and adjudged of from the Court of Session. At the Revolution the Bill of Rights expressly claims as a right privilege of appealing from the sentences of the Court of Session; but with regard to criminal cases there never existed an idea of an appeal from the Court of Justiciary before the Union. They in express words say there lies no appeal." I submit it has never been doubted that with regard to all cases from a final judgment by the Court of Session there lies to this House as of right an appeal. See also Mackay's Practice of

(1) (1781) 2 Pat. App. 563, 565.

H. L. (Sc.) 1901 OSBORNE v. BARCLAY, CURLE & CO.

the Court of Session, vol. i. p. 41: "The general right of appeal against final judgments on the merits in civil causes has never since" the Union "been disputed."

[EARL of HALSBURY L.C. It has been established that there is a right of appeal, and it is immaterial to say how or why; but the principle that I have referred to is that where you have a Court selected for a particular purpose you must shew a right of appeal, either because it comes within some general category which is appealable, like orders in the Court of Appeal; or else you must have express words giving an appeal. It does not follow as a matter of course there is an appeal in every case; for where you have jurisdiction created and particular persons charged with that jurisdiction, you must shew a right of appeal. I should agree with you that if you brought it within the category of ordinary interlocutors of the Court of Session then your general principle applies, and you have brought it within a category that was appealable; but it does not at all follow that this particular jurisdiction created for a particular purpose is appealable.]

The main point of my argument upon that is that I can hardly conceive anything that is more within the range of appealability than a determination by a duly established Court of Law of what is in terms a question of law, because that is the question here. Courts of Law not set up for the special purpose, but established by the ordinary rules, have submitted to them by the Legislature a question of law so named for determination, and, therefore, it rather appears to me that the onus would be upon my learned friend of shewing there should not be the ordinary sequence of events under the corollary of rights arising out of the situation so described: that an ordinary Law Court shall determine a plain, or, it may be, a difficult law question, it follows that the ordinary sequence of appeal shall emerge, unless the respondents are able on the contrary to shew that there is something which determines by its language conclusively that an appeal is excluded. Another statute shewing the language employed to exclude an appeal is that with regard to appeals in the Valuation of Lands, Scot-

land, the leading statute of 1854 (17 & 18 Vict. c. 91), s. 8 of which puts the language thus: "And the deliverances of such commissioners and magistrates respectively upon such appeals and complaints shall be final and conclusive, and not subject to review." There is always an affirmative followed by a negative, an excluding term: see also the Friendly Societies Act, 1855 (18 & 19 Vict. c. 63), s. 41; the Registration Courts Act, 1868 (31 & 32 Vict. c. 48), s. 22; and the Debt Recovery (Scotland) Act, 1867 (30 & 31 Vict. c. 96), s. 12. There are a whole series of statutes covering the last three decades, and in all these instances there has been an exclusive term employed excluding the jurisdiction, and forbidding practically a further procedure in the Court. The parties are bound to know in such a case that they can go no further than a certain stage. With regard to the words "finally hear," they simply mean that there shall be a complete decision of the case so far as the Court considering it is concerned, but that they do not deal with the main point which is now before the Committee as to the exclusion of the ordinary right of a litigant in Scotland; and it is for that reason in this case that I ask your Lordships to say that this appeal should be allowed to proceed. If the respondents' contention is right, a result will arise which could not have been in the minds of the Legislature, namely, that upon the statute in identical terms there should be quoad legal procedure a very plain and substantial difference of right emerging between the two countries.

Campbell, K.C., in reply. The authorities referred to have not much bearing upon this case, for, unless one looks at the whole of the clauses and the purport of a statute, it is of very little importance what were the prescribed words used. We have a case where the word "final" has alone been held to exclude review under precisely similar legislation in 1878. On tolls being abolished, persons who made extraordinary use of a road were to be held liable to pay the expenses of extraordinary traffic, and the road authorities could recover these extraordinary expenses from them in a summary manner. In England it depends on the Highways and Locomotives (Amendment) Act (41 & 42 Vict. c. 77), s. 23. In Scotland

H. L. (Sc.) 1901 OSBORNE v. BARCLAY, CURLE & Co.

the same remedy is given by the Roads and Bridges (Scotland) Act (41 & 42 Vict. c. 51), s. 57. But, curiously enough, while the English Act simply says that those expenses are to be recovered in a summary manner, the Scottish clause is verbatim the same as the English one except for these words: "such authority may recover in a summary manner before the sheriff (whose decision shall be final)." In a recent case (*Milne & Co.* v. *Aberdeen District Committee* (1)) the Court of Session decided that it was not competent to bring that up before the Court of Session, on the ground that the decision was final. That is just as great an anomaly as anything the respondent has referred to—that in these cases of vast importance to traders, &c., where claims for thousands of pounds are made by road authorities, in Scotland there is no appeal from the sheriff and the county court judge. And there is no decision of the Supreme Court upon the subject; but, on the other hand, there are a great many cases which are frequently quoted before the Court of Appeal in England. The old cases referred to by my learned friend were cases of a quasi criminal kind arising out of statutes imposing penalties. The consideration there might have been entirely different, and it might well be that the justices had gone outside their jurisdiction altogether. But here we are dealing with a pure matter of law, which this statute has declared in so many words to be finally determined. There is no current of authorities in Scotland giving to the word "final" any meaning except its own natural meaning. In special cases it may get an unnatural meaning given to it; but there is nothing in this statute to prevent it receiving its natural meaning. As to where the onus lay as to excluding an appeal, see *Magistrates of Portobello* v. *Magistrates of Edinburgh*. (2) There Lord Moncreiff said: "Where a new and special jurisdiction is given to any Court, the exercise of it must be regulated entirely by the conditions of the statute under which it is conferred, and in the general case remedies which might have been competent in an ordinary civil process are not to be presumed or inferred to be given by the particular statute. That has been affirmed to be a ground of judgment in various

(1) (1899) 2 F. 220. (2) (1882) 10 R. 130, 137.

cases of a similar kind." The present case comes under that category, because this is a new and entirely unheard-of jurisdiction—that the Court of Session should determine a point of law which arises in an arbitration. Lord Moncreiff goes on to treat of quite a different class of cases. He said: "But, on the other hand, I imagine that where a well-known and recognised jurisdiction is invoked by the Legislature for the purpose of carrying out a series of provisions which are important for the public without any specific form of process being prescribed, the presumption is that the ordinary forms of the Court are to be observed in carrying out the provisions"; and accordingly there would be an appeal. The latter category is very much what arises in regard to the provision about the Court of Appeal in England. Where it is said that there is to be an appeal to the Court of Appeal, and nothing more is said, the Court of Appeal deals with it as an ordinary case; but here a new jurisdiction is conferred upon the Court of Session, and it is said in so many words that the jurisdiction is to be final, and although in many other statutes, such as those quoted, stronger language has been used, the explanation is that in many of them Parliament was depriving the litigant of the right of appeal which he would otherwise have had, and saying that in certain cases that should be taken away, and it was then necessary that that deprivation should be made very clear.

EARL OF HALSBURY L.C. We are all of opinion that this appeal is incompetent. Whatever may have been the reason for it, we think the Legislature has conferred the jurisdiction upon the Court of Session under circumstances and in language which render it impossible to say that any appeal to this House is competent. That may, and I think it does, render the observation which was made at the bar a just and true one, namely, it does seem a somewhat anomalous condition of things that there should be an appeal in similar cases to this House from the English Court of Appeal, and yet none in Scotland; but that, after all, is only one of the anomalies which may be created by different legislation. We must construe the language as it stands here; and, looking at the language as it stands

H. L. (Sc.) 1901 OSBORNE v. BARCLAY, CURLE & CO.

with reference to the subject-matter dealt with, we are all, as I have said, of opinion that the appeal is incompetent.

Appeal dismissed with costs.

Lords' Journals, March 29, 1901.

Agents for appellant: *William Robertson & Co., for J. & J. Gallethy, S.S.C., Edinburgh, and J. M. & J. H. Robertson, Writers, Glasgow.*

Agent for respondents: *Leslie Field, for Morton, Smart & Macdonald, W.S., Edinburgh, and Biggart & Lumsden, Glasgow.*

[HOUSE OF LORDS.]

H. L. (Sc.) 1901 *May* 7.

SMITH . . . . . APPELLANT;

AND

PATRICK AND ANOTHER . . . . . RESPONDENTS.

Trustee—Breach of Trust — Partnership — Discharge — Liability of Retired Partners for Trust Debt—Partnership Act, 1890 (53 & 54 *Vict. c.* 39), *s.* 17, *sub-s.* 3.

A power to lend trust money to a firm consisting of certain individuals does not authorize a loan to a firm differently constituted, whether including more individuals or less.

A testator, who had been a partner in the firm of A. & W. Smith & Co., nominated his wife and two of the three remaining partners in the firm as his trustees, and he specially authorized his trustees to allow his share of the capital to remain as a loan to the firm so long as his trustees should think it safe to allow it to remain. The wife died. The amount of the capital was ascertained and continued as a loan to the firm, but without any bond or other obligation being given for it. The third partner, not a trustee, was dissatisfied with the conduct of the firm's business, the result being that he agreed to retire under an agreement by which the two trustee partners paid him a sum of 9000*l.* for his interest in the firm, and by which the trustee partners undertook to meet all the liabilities of the firm, take over all the assets, and relieve the third partner of all debts. The new firm was carried on by the two trustee partners under the old name, and it paid a half-year's interest on the debt due to the trust estate. A year after the retirement of the third partner, the trustee partners, as trustees, granted to the old firm and the third partner a discharge of the

debt due to the trust. And about a month afterwards the new firm became insolvent and the two partners bankrupt. The trustee partners resigned their trusteeship, and new trustees were appointed, who acted as creditors on the new firm, and received a dividend out of the new firm's assets. They then raised against the retired third partner this action, claiming reduction of the discharge and payment of the balance of the trust debt:—

Held, affirming the decision of the First Division of the Court of Session, that the discharge was a breach of trust on the part of the trustee partners from which the third partner could not profit, the discharge being gratuitous; that the actings of the new trustees in ranking as creditors on the new firm's assets did not discharge the liability of the old firm; and that the third partner was liable to make good the loss to the trust estate.

APPEAL from the First Division of the Court of Session, Scotland. (1)

The appellant, Alexander Dawson Smith, was a retired partner of the firm of A. & W. Smith & Co., engineers, Glasgow, the respondents, Joseph Patrick and Robert Howie, were the trustees of the late Alexander Smith, junior. The action was by the respondents, who sought reduction of a deed of discharge, dated November 3, 1896, granted by the late trustees, William Smith and Hugh Osborne Smith, who had resigned, whereby they, as trustees of Alexander Smith, junior, discharged the dissolved firm of A. & W. Smith & Co. and the appellant, Alexander Dawson Smith, as a partner and as an individual, of a debt due by them to Alexander Smith, junior, or to his trustees. The discharge was challenged on the grounds—(1.) That it was granted by the trustees of Alexander Smith, junior, without any consideration, so giving up an obligation to the estate for nothing, and that it therefore was ineffectual; and (2.) because, being gratuitous, it was obtained by fraud and collusion on the part of the appellant and the granters, William Smith and Hugh Osborne Smith. All the judges of the Court of Session and this House held that there was not the slightest ground for imputing fraud or collusion to the appellant. The firm of A. & W. Smith & Co. carried on business as engineers, Glasgow. In 1892 the leading partner, Alexander Smith, senior, died, and the firm thereafter consisted of his three sons, Alexander Smith, junior, William Smith, Hugh Osborne Smith, and the appellant

(1) (1900) 37 S. L. R. 557.

H. L. (Sc.) 1901 SMITH v. PATRICK.

Alexander Dawson Smith, who was no relation. On December 7, 1893, Alexander Smith, junior, died, leaving a trust disposition and codicil, dated January 6 and September 20, 1893. He was survived by his widow and one child, Alexander Herbert Smith, a minor, who was the sole beneficiary on his father's trust estate. As regards Alexander Smith, junior's, interest in the firm, he "specially authorized my trustees to allow my share of the capital at my death in the concern of A. & W. Smith & Co., engineers, Eglinton Engine Works, Glasgow, of which I am a partner, to remain as a loan to said firm should the partners thereof be willing to retain the same on loan, and that so long as my trustees in their opinion consider it reasonably safe to allow it to remain, and that also upon such terms and conditions as to interest, and with or without security beyond the personal obligation of the said firm and partners thereof, as my trustees shall think proper." And he further declared that his trustees should not be liable "for allowing my share of the capital in the firm of A. & W. Smith & Co. to remain as a loan so long as they think proper, nor for any loss that may arise therefrom, seeing it is my desire that my share should remain in the firm." The trustees of the said trust deed were the widow (who died before the date of the discharge mentioned above) and William Smith and Hugh Osborne Smith. These trustees allowed the amount of the trust of Alexander Smith, junior, to remain in the firm, and the amount of this trust was after some time fixed at 19,857*l.* 17*s.* 9*d.* That sum was entered in the books of the firm as a debt due by the firm to the trustees, and interest at 5 per cent. was regularly paid. But no bond or other acknowledgment was granted to the trustees. The firm, after the death of Alexander Smith, junior, consisted of William Smith, Hugh Osborne Smith, and the appellant Alexander Dawson Smith. The appellant went abroad in 1894–95. It appears that during the appellant's absence some business had been undertaken in regard to the Bronte estate in Trinidad, which ultimately turned out badly. And before the appellant retired from the firm, this speculation had resulted in a debt to the estate of 8000*l.* insufficiently secured. Various plans were suggested to

avert this loss, and the trustees, William Smith and Hugh Osborne Smith, were for taking over the whole Bronte estate. The appellant strongly opposed this project, considering it foreign to the legitimate business of an engineering company, and the difference between him and his partners became so great that on September 30, 1895, William Smith and Hugh Osborne Smith gave notice to the appellant that the partnership would be dissolved as at March 31, 1896, which they had power to do under the contract of partnership. There was a question whether they could buy out the appellant, or whether they were bound to sell their shares to him. The appellant, being perfectly satisfied with the flourishing nature of the business, endeavoured to raise capital to buy out W. and H. O. Smith; but he found himself unable to do this, chiefly because the other partners were in a trust capacity proprietors of the business premises. The result was the appellant agreed to retire. The terms on which his retirement was made were contained in a minute of agreement, dated December 23, 1895, between William Smith and Hugh Osborne Smith on the one part and the appellant on the other. This agreement recited that it had been arranged to dissolve the firm of A. & W. Smith & Co. as at the date thereof; that William Smith and Hugh Osborne Smith should, on the execution of the deed, pay to the appellant 9000*l.*, which sum the appellant agreed to accept in full payment of all sums standing at his credit in the books of the company, whether in name of capital, interest, salary, or otherwise; that notice of the dissolution should be duly advertised and sent to the creditors of the firm; and that William Smith and Hugh Osborne Smith should pay, and so free and relieve the said Alexander Dawson Smith "of all the obligations due by the said firm of A. & W. Smith & Co.," and exhibit to the said Alexander Dawson Smith, or any one duly authorized by him, discharges thereof; and that William Smith and Hugh Osborne Smith "should have right to the whole assets of the firm, and right to carry on the business under the firm name." The appellant received payment of the 9000*l.*, but no payment was made to the trust estate of the debt due to it by the firm at the date of retirement. At the date of

H. L. (Sc.) 1901 SMITH v. PATRICK.

the dissolution the appellant received no discharge from the trustees of his obligation to the trust estate; in fact, the evidence clearly shewed he considered the firm of so flourishing a nature that he never thought the trust money due by the firm of A. & W. Smith was in jeopardy, and it was only on the advice of his law agents that in 1896 he pressed for a discharge. On November 3, 1896, after the death of Mrs. Alexander Smith, junior, a discharge was signed and delivered to him. It recited that the firm was dissolved by the retirement therefrom of the said Alexander Dawson Smith, and then it states: We, the said William Smith and Hugh Osborne Smith, as the continuing partners, undertook to free and relieve the said Alexander Dawson Smith of all the obligations due by the dissolved firm, and that we, as trustees foresaid, "have accepted, as we hereby accept, the present firm of A. & W. Smith & Co., engineers, Glasgow, of which we, the said William Smith and Hugh Osborne Smith, are the sole partners, as our debtors in lieu of the said dissolved firm and partners. Therefore we, as trustees foresaid, have discharged and hereby discharge the said dissolved firm of A. & W. Smith & Co., and the said Alexander Dawson Smith as a partner thereof and as an individual, of all sums due and addebted by them or him to the said deceased Alexander Smith, junior, or to us as trustees aforesaid." The appellant accepted the discharge in implement of the obligation undertaken by his former partners in the minute of agreement of dissolution.

The notice of dissolution advertised and sent to the trustees was to the effect that the firm was dissolved by mutual consent, and that W. and H. O. Smith would continue the business for their own behoof and would collect all debts and discharge all liabilities.

From the minutes of the trustees' meetings dated November 3, 1896 (of which minute it is only fair to say the appellant knew nothing), it appeared that the law agent of the trust pointed out to the sole trustees, William Smith and Hugh Osborne Smith, that, as they themselves were now the only partners of the firm of A. & W. Smith & Co., it would be difficult for them as trustees to consider the matter impartially, and that they ought

to assume other persons as trustees who would consider the application for the discharge of the appellant apart from the interest of A. & W. Smith & Co. The law agent further stated that the effect of their signing the discharge was to discharge the security held by a trust investment, and that they ought not to do so. Notwithstanding this advice, without further consideration they took the matter into their own hands, and they signed the document there and then. The two trustees, after nominating other trustees, resigned. On December 3, 1896, a month after executing the discharge, the firm of A. & W. Smith & Co. became insolvent. The stoppage of the firm was a great surprise to everybody. The assets were sold to a limited company and the promoter made a large profit. The new trustees acceded to the trust, and claimed and received dividends amounting to over 9600*l.* On December 19, 1896, the trustees considered the discharge and took the advice of counsel. On July 1, 1897, counsel's opinion was read, advising that proceedings should be taken against the appellant. Thereupon the trustees raised this action, suing for the original debt under deduction of the said dividends so received. The respondents sought reduction of the discharge on the grounds stated above. The appellant contended that the course of dealing between the trustees and the new firm, subsequent to his retirement from the partnership and before the granting of the discharge, was sufficient to shew that the trustees had agreed to discharge the appellant of his obligation and to accept the new firm as their debtors in place of the old; and, secondly, that the new trustees had, without notice to the appellant of their claim, proceeded to act as creditors of the new firm and agreed to the assets being sold, thus depriving the appellant of his right to be indemnified out of the assets of any claim made on him. Evidence was gone into in the Court of Session, and it appeared that 9000*l.* was more than the appellant's share, but that the 9000*l.* was a compromise; that on December 23, 1895, the state of the company was flourishing; that the outside creditors were only 24,777, and, making large provision for depreciations, the estimated net capital of the three partners stood in the books at 49,745*l.*; that amongst the assets were included money

H.L. (Sc.) 1901 SMITH v. PATRICK.

on deposit receipt for 3500*l.*, and a loan of 3000*l.* to the firm's law agents; that it was proved the appellant thought the business substantially a good one and had no idea the firm was in any danger. The Lord Ordinary (Lord Kincairney) on January 5, 1899, held the appellant not liable; but the First Division on March 20, 1900, reversed the Lord Ordinary's interlocutor, and held the appellant liable for payment to the respondents of 9682*l.* 17*s.* 6*d.* with certain interest.

May 6, 7. *Scott Dickson, S.-G. for Scotland, Levett, K.C.* (with them *Younger*, of the Scottish Bar), for the appellant. The decision of the Court of Session was erroneous. The appellant had no knowledge that one of the partners was overdrawing his account, nor had he any notice of what the trustees were doing; the appellant thought so well of the business that he himself was desirous of buying the others out and carrying on the business without them. The evidence shews that the failure of the new firm was a great surprise to everybody. It is clear no charge of fraud can be substantiated against the appellant. Obtaining the discharge within a month of the failure was really not open to suspicion, as the appellant did not want the discharge, considering the firm most substantial; but his law agent thought he ought to have it as a matter of prudence. The balance-sheet of 1895 shewed the company in a very satisfactory condition, and that the estimated net capital of the three partners amounted to 49,745*l.*, and 6500*l.* of this was on deposit. Nor was the discharge gratuitous nor in breach of trust, but a perfectly legitimate exercise by the trustees of their powers under the trust deed. So long as the trustees lent the money to what was practically the same business, they had power under the trust deed and codicil to do so irrespectively of a change in the members of the partnership. The trustees were given a very wide discretion. The firm had been going for sixty years and making 10,000*l.* a year profit. The trustees were leaving their money in a most excellent business according to their opinion, and were getting 5 per cent. instead of 3 per cent. The financial condition of the new firm was also considered good by financial men. The British Linen Company

Bank allowed the new firm an overdraft of 10,000*l.* without any security except the personal obligation of the new firm and its partners. The testator trusted his old partners, and relieved them from the strict rule in equity that trustees must not lend trust money to themselves. He trusted them to prefer their own interest to the interests of his wife and child. It was to remain in the business as long as the trustees thought it fit. There was no limitation in the loan that the moment one partner left the power to lend ceased. A similar case to this was *Alexander* v. *Lowson's Trustees* (1); see also Bell's Commentaries (McLaren), vol ii. 525, and Bell's Commentaries, 635. Then, assuming the liability against the appellant did exist, the conduct of the new trustees has been such that they are barred from pursuing this action. They had knowledge of the facts. Both the old and new trustees dealt with the new firm as their borrower: see *Hart* v. *Alexander*. (2) The old trustees received half a year's interest. And after the dissolution the new trustees met, and the law agent to the trust was directed to have the bond of the new firm executed as altered with the appellant's name struck out. The new trustees dealt with the new firm's assets, and they were parties to the assets being sold. They accepted dividends out of the assets, and made no intimation to the appellant of any claim against him until November 11, 1897; so that the appellant was debarred from protecting interests in the realization of the assets. The discharge was a distinct benefit to the trust, as it enabled the trustees to get from the new firm 10*s.* in the pound. If the trust money had been repaid to the trust and re-lent to the new firm, the trustees would have had the right to pursue the new firm. But assuming it had not been paid back, what right had the trustees to pursue the new firm for a debt of the old firm. By electing to proceed against the new firm they adopted the loan to the new firm. It is plain now from the evidence and trust minutes that the new trustees adopted the liability of the new firm instead of that of the old one: see *Rolfe and Bank of Australasia* v. *Flower Salting & Co.* (3) The trustees claim

(1) (1890) 17 R. 571. (2) (1837) 2 M. & W. 484.
(3) (1865) L. R. 1 P. C. 27.

H. L. (Sc.) 1901 SMITH v. PATRICK.

to be put back into their original position; but the appellant contends that the trustees' actings bar them from the right, for they cannot make restitutio integrum to the appellant.

Haldane, K.C., and *Ure, K.C.* (of the Scottish Bar), for the respondents, were not called upon.

EARL OF HALSBURY L.C. My Lords, it appears to me that this is a particularly plain case, and I confess I should feel great regret if there could be any doubt as to what the decision of it should be.

In the first place, I disagree with the learned counsel as to the true construction of the will, and I believe that is enough to decide this case. It appears to me that, not only in form but in substance, when a testator is disposing of his effects and leaving a large sum of money for the benefit of his son, it is not a mere technicality to say that a new firm is a different person. On the contrary, he has been familiar with the firm and the mode in which it is conducting its business and so on all his life, and when he says, "Well, there is a certain sum of money, 19,000*l.*, and that may continue in the firm as a loan," that means the firm with which he is familiar. It is not denied by the learned counsel here that the change which took place in the firm did make it a new and a different firm. In point of law, therefore, their contention is, that, if instead of there being all the persons that there were originally in it, not one of them remained, but it was a firm, to use the loose phrase which the learned counsel indulged in, "substantially carrying on the same business," that would be equally within the power given by the will. I entirely differ from that view. It appears to me that the acquaintanceship with the modes of business of the firm and the individuals composing it may have formed a factor, and probably did form a factor, in the mind of the testator for giving the permission that the money should continue as a loan. Having arrived at that conclusion, there can be no doubt as to what follows. The lending it to a new firm was not within any power given by the will, and, inasmuch as it was not a proper trust investment, it was undoubtedly a breach of trust by the trustees.

Then as to the granting of the discharge, I do not think it

requires much observation to shew that that discharge, whether granted or not, was not worth the paper on which it was written. There was no antecedent obligation on the trustees to grant the discharge at all. What they did was to grant the discharge to a person, because in their individual capacity they had agreed with him to do it; and in regard to their doing that I confess I take the view taken in the Inner House. It appears to me that, if we are to form a judgment upon the facts, the circumstances shew most distinctly that the reason why they granted the discharge was in order to escape from the embarrassment of having to pay a large sum of money. That in so doing they did not regard the interests of the persons whose interest as trustees they were bound to regard; and in that respect I agree with the unanimous judgment of the Inner House, that they were guilty of a fraudulent breach of trust. It may be very hard upon the appellant, to whom, so far as I can see, no blame is attributable at all, that he is made to suffer for their fraud; but the question is whether or not the beneficiary is to suffer by the fraud of his trustees. It appears to me that there is no doubt that there was not the least pretence of justification for the acting of this new firm in its character as a firm, and then its members alternating with themselves in their character as trustees. It is said, forsooth, that a wide discretion was given to the trustees. Yes, but acting as trustees, and not when they are deciding for themselves and in their own interests whether they will preserve the property of their cestui que trust or not, or whether they will do that which in effect is supplying out of the beneficiary's own money a sort of composition which they pay to their creditors, or at least in great measure.

My Lords, I should be very sorry indeed if any doubt were entertained about the principles upon which this case should be decided. It appears to me that it is luce clarius that the judgment of the Inner House is right, and therefore I move your Lordships that this appeal be dismissed with costs.

LORD SHAND. My Lords, I shall make only a few observations in this case, after what has fallen from his

H. L. (Sc.) 1901 SMITH v. PATRICK. Lord Shand.

Lordship on the Woolsack, for I concur entirely in all that has been said.

It has been submitted in argument that the terms of this trust deed are very wide indeed—that they authorize practically a loan, not only to the firm as it existed at the time of the testator's death, but to that firm, if continued, whatever change may occur in the partners. I agree with your Lordship in thinking that it was an important change in the firm that one of the partners, the partner who seems to have taken the entire charge of the engineering department, had withdrawn from the firm, and I think, therefore, as your Lordship does, on that ground it was ultra vires on the part of the trustees to continue or to give the loan to the new firm.

In the next place, there is undoubtedly this peculiarity in the case, and it is a very important one, that when the trust deed was executed there were three trustees named in existence—William Smith, Hugh Osborne Smith, and the testator's widow. On the other hand, there were three partners—William Smith, Hugh Osborne Smith, both of whom were trustees, and Alexander Dawson Smith, who was not. When Alexander Dawson Smith retired from the business and William Smith and Hugh Osborne Smith became the sole partners, they became also the sole trustees, the widow having died in the meantime, the positions of creditors and debtors were united in them alone. My Lords, it appears to me that in those circumstances they, as the sole creditors, not only could not lawfully lend to themselves as the sole debtors, but had no power to grant the discharge in favour of the firm of which they were themselves the sole partners. It is, I think, clear that the discharge was entirely without consideration, for it is idle to say that in accepting the firm of which the trustees themselves were alone partners as debtors the trust estate was getting any security which they had not already. The result of the deed was practically to discharge the appellant of his indebtedness to the trust estate without consideration, and the discharge was granted really in the interest or for the pecuniary benefit of the trustees themselves, who took the matter into their own hands and disregarded the judicious and sound advice of their

law agent. In my opinion this was a clear breach of trust, and the deed was invalid.

My Lords, upon the last point I shall only say that I do not think the following of this trust estate, so as to recover the monies which go to the credit of the appellant and reduce his liability for the debt now sued for, to a large extent, can be founded on as a proceeding that releases him in any way. It appears to me that it was a proceeding that was for his advantage. He gets the benefit of it, and I fail to find any circumstances which enable him to plead that he was thereby released from liability.

I have only to add that I concur in the observations made by Lord Adam and Lord M'Laren in their judgments on the reclaiming note.

LORD DAVEY. My Lords, I agree with my noble and learned friend on the Woolsack that this is a particularly plain case. It appears to me that you have only to read the document which is impeached, namely, the so-called discharge signed by William Smith and his brother Hugh Osborne Smith, to see on the face of it what the transaction was. It recites that the firm is "dissolved" "by the retiral therefrom of the said Alexander Dawson Smith," and then it states: "We, the said William Smith and Hugh Osborne Smith, as the continuing partners, undertook to free and relieve the said Alexander Dawson Smith of all the obligations due by the dissolved firm, and that we, as trustees foresaid, have accepted, as we hereby accept, the present firm of A. & W. Smith & Co." (that is themselves), "engineers, Glasgow, of which we, the said William Smith and Hugh Osborne Smith, are the sole partners, as our debtors, in lieu of the said dissolved firm and partners; therefore we, as trustees foresaid, have discharged and hereby discharge the said dissolved firm of A. & W. Smith & Co. and the said Alexander Dawson Smith as a partner thereof." In other words, We as trustees, having as our debtors ourselves and Alexander Dawson Smith, elect to discharge Alexander Dawson Smith and to retain ourselves.

Now, my Lords, can anybody acquainted, I do not say with

H. L. (Sc.) 1901 SMITH v. PATRICK. Lord Davey.

the refined doctrines of equity, but with the commonest principles of law, treat that document as entitled to the slightest value in any respect? It is undoubted that Alexander Dawson Smith was a debtor to this trust estate, and he relies upon this document as his discharge. My Lords, I agree with what Lord Adam said, that "By so doing" (that is, by signing the discharge) "it appears to me that, as trustees, they knowingly or deliberately sacrificed the interests of the estate under their charge in their own personal interest as debtors to the trust. By so doing, it appears to me that they not only committed a breach of trust, but a fraudulent breach of trust."

My Lords, I will not say anything about the construction of the will, because I entirely agree with what has fallen from my noble and learned friend. There can be no doubt in my mind that a power to lend to a firm consisting of certain individuals does not authorize a loan to a firm differently constituted whether including more individuals or less. Still less does it authorize it when the suggestion is that the trustees having by the death of one of their number been reduced to two persons and the partnership by the retirement of one of the partners having been reduced to the same two persons, those gentlemen in their position of trustees and their position of partners take the trust estate into their own hands and use it for their own business under the pretence that they have lent it to themselves.

I think it is perhaps due to Mr. Levett that I should say one word as to his argument that by proving against the partnership estate the present trustees have debarred themselves from suing Mr. Alexander Dawson Smith, the appellant. My Lords, it appears to me, as I have already said, that Mr. Alexander Dawson Smith, having obtained his discharge by means of a breach of trust, cannot set up that discharge, and being a debtor to the trust estate has not discharged himself, and remains liable. But, my Lords, that is quite consistent with the power of the beneficiary to follow the trust estate into the place where it has improperly got, namely, into the partnership funds, and claim the amount of the trust estate against the partnership estate. It is well established that you

may sue a person who is liable to replace trust estate, and you may also pursue your other remedies against the trustees who have improperly dealt with it. My Lords, I need say no more about it, but merely add that I entirely agree that the appeal ought to be dismissed.

LORD BRAMPTON. My Lords, I entirely concur, and have nothing to add.

LORD ROBERTSON. My Lords, it would be strange if the law allowed a transaction so plainly unfair as that which is now in question. This trust estate was made to release one of three debtors without his giving or providing to the estate anything whatever that it did not have before, this release being the act of the two remaining debtors, who were the sole trustees, and were at the time insolvent.

The demerits of the proceeding, so far as the trustees are concerned, are too flagrant to require comment. They had no right gratuitously to release a debtor of the trust estate, and they had no right, as I hold, under this trust deed, to lend to any other firm than that existing at the testator's death; still less had they a right to do this, for the furtherance of their own convenience, by ridding themselves of a partner whom they found censorious of their own irregularities, and by carrying out their obligations to him at the expense of the trust estate. The act was clearly a breach of trust, and I think the First Division had adequate grounds for holding it to be fraudulent.

I may in passing say that I am not deterred from this conclusion by the circumstance that those two trustees were not parties to the action, and were not witnesses. In the practice of Scotland it frequently happens (as in the case of wills and of forged instruments) that the fraud of a third party is the medium concludendi, and the mere fact of his fraud gives him no proper place as a party to the cause, and imposes no obligation on the party asserting his iniquity to offer his testimony.

This being the nature of the discharge, the appellant cannot hold his discharge, however innocent he may be, unless he

H. L. (Sc.) 1901 SMITH v. PATRICK. Lord Robertson.

gave valuable consideration—and of consideration he gave none. Everything which the new firm gave, their estate and the liabilities of its partners, the trust estate had already—not, of course, to each item the identic and specific assets of the new firm, but the corresponding, and, so far as appears, equivalent assets of the old firm. The attempt of the appellant to found on this point only derives plausibility from splitting up what is really one transaction—the dissolving the old firm, and the making the new firm the sole debtors.

The appellant has endeavoured to found an argument on the change of circumstances which has occurred as disentitling the respondents to the remedy they seek. This seems to me to be a fallacy arising from the merely formal circumstance that the respondents' summons includes a reduction. This is not an action of rescission of a contract obtained by fraud, although, like such actions, it takes the form of a reduction—it is a demand for payment of a debt, backed with appropriate formal procedure for parrying a defence founded on a valueless discharge. It was within the rights of the creditors to take as much payment as they could get from the estates of the remaining debtors without impairing their rights to enforce the several liability of the third. Even if the appellant were right in saying that the respondents were not entitled to rank on the estate of the new firm, their doing so has in no way prejudiced the appellant, and cannot be pleaded by him as an answer to the present demand.

I am entirely satisfied with the judgment of the First Division, and consider the reasoning of Lord Adam and Lord M'Laren to be unimpeachable.

Interlocutor appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 7, 1901.

Agents for appellant: *William Robertson & Co., for J. W. & J. Mackenzie, W.S., Edinburgh.*

Agents for respondents: *Flux, Thompson & Flux, for Simpson & Marwick, W.S., Edinburgh.*

[HOUSE OF LORDS.]

DAVID W. E. SMITH . . . . . APPELLANT; H. L. (Sc.) 1901; May 9.

AND

HENRY CALLANDER . . . . . RESPONDENT.

Landlord and Tenant—Compensation for Improvements—Retrospective Effect of Statute—Agricultural Holdings (Scotland) Act, 1883 (46 & 47 *Vict. c.* 62)—*Market Gardeners Compensation (Scotland) Act*, 1897 (60 & 61 *Vict. c.* 22), *s.* 4.

The Market Gardeners Compensation (Scotland) Act, 1897, is not retrospective, and does not entitle tenants under leases current at the commencement of the Act to compensation in respect of market-garden improvements executed prior to the commencement of the Act.

APPEAL from the Second Division of the Court of Session, Scotland. (1)

The appellant was David Whytt Ewart Smith (tenant) and the respondent was Henry Callander (landlord).

Under a lease dated April 19 and May 2, 1881, the appellant became tenant under the respondent of the farm and lands of North Elphinstone, extending to about 359 acres, for the term of nineteen years from Martinmas, 1880. The lease was an ordinary agricultural lease, containing no unusual provisions. About the year 1884, or soon after, the appellant began to cultivate raspberries and strawberries upon part of the lands comprised in the lease, and continued so to do down to the expiry of his lease. The appellant affirms, and it has not been seriously disputed, that this cultivation was carried on with the knowledge of the respondent and the successive factors on his estate, and without any objection on their part. Previous to the term of Martinmas (November 11), 1898, the appellant gave notice, in terms of the Agricultural Holdings (Scotland) Act, 1883, that he intended to leave the farm at the expiry of his lease. On or about July 7, 1899, the appellant sent to the respondent a notice of claim for compensation

(1) (1900) 2 F. 1140.

H. L. (Sc.) 1901 SMITH v. CALLANDER.

under the Agricultural Holdings (Scotland) Act, 1883 (1), and the Market Gardeners Compensation (Scotland) Act, 1897, including, among other items, compensation for strawberry and raspberry plants, and buildings erected for the business of a market gardener.

(1) The Agricultural Holdings (Scotland) Act, 1883 (46 & 47 Vict. c. 62), enacts:—

Sect. 1: "Compensation for Improvements.—Subject as in this Act mentioned, a tenant who has made on his holding any improvement specified in the schedule hereto, shall, from and after the commencement of this Act, be entitled on quitting his holding at the determination of a tenancy to obtain from the landlord as compensation under this Act for such improvement such sum as fairly represents the value of the improvement to an incoming tenant: Provided always, that in estimating the value of any improvement in the schedule hereto there shall not be taken into account as part of the improvement made by the tenant what is justly due to the inherent capabilities of the soil."

Sect. 2: "As to Improvements executed before the Commencement of Act.—Compensation under this Act shall not be payable in respect of improvements executed before the commencement of this Act, with these exceptions, namely—

"(1.) Where a tenant has within ten years before the commencement of this Act executed an improvement specified in the third part of the schedule hereto which he was not under an express obligation to make, and he is not entitled under any contract or custom to compensation in respect of such improvement; or

"(2.) . . . .

"In either of these cases the tenant, on quitting his holding at the determination of the tenancy after the commencement of this Act, may claim compensation under this Act in respect of the improvement which he has executed in the same manner as if this Act had been in force at the time of the execution of such improvement."

Schedule: "Part I. Improvements to which consent of Landlord is required.—(1.) Erection or enlargement of building. (2.) Formation of silos. (3.) Laying down of permanent pasture. (4.) Making of water meadows or works of irrigation. (5.) Making of gardens. (6.) Making or improving of roads or bridges. (7.) Making or improving of watercourses, ponds, wells, or reservoirs, or of works for supply of water for agricultural or domestic purposes. (8.) Making of permanent fences. (9.) Reclamation of waste land. (10.) Weiring or embanking of land and sluices against floods.

"Part II. Improvement in respect of which notice to Landlord is required.—(11.) Drainage.

"Part III. Improvements to which consent of Landlord is not required.—(12.) Boning of land with undissolved bones. (13.) Claying of land or spreading blaes upon land. (14.) Liming of land. (15.) Marling of land. (16.) Application to land of purchased artificial or other purchased manure. (17.) Consumption on the holding by cattle, sheep, or pigs of cake or other feeding stuff not produced on the holding."

Following on this claim, the appellant presented a petition in the Sheriff Court at Haddington for the appointment of a referee under the Acts. The respondent lodged defences, in which he objected to the competency of the claim in so far as it was based on the Market Gardeners Compensation Act, 1897. (1)

On December 15 the Sheriff Substitute appointed W. H.

(1) The Market Gardeners Compensation (Scotland) Act, 1897 (60 & 61 Vict. c. 22), enacts:—

Sect. 1: "This Act . . . . shall be read and construed as part of the Agricultural Holdings (Scotland) Act, 1883, hereinafter called the principal Act."

Sect. 2: ". . . . This Act shall come into operation on the first day of January, 1898, which date is hereinafter referred to as the commencement of this Act."

Sect. 3: "Where after the commencement of this Act it is agreed in writing that a holding shall be let or treated as a market garden, the following provisions shall have effect:—

"(3.) The following improvements shall, as far as regards such holding, be deemed to be comprised in Part III. of the said schedule:—

"(i.) Planting of standard or other fruit trees permanently set out;

"(ii.) Planting of fruit bushes permanently set out;

"(iii.) Planting of strawberry plants;

"(iv.) Planting of rhubarb and other vegetable crops which continue productive for two or more years;

"(v.) Erection or enlargement of buildings for the purpose of the trade or business of a market gardener:

"(4) Sect. thirty-seven of the principal Act shall be read and construed as if the words 'with the consent in writing of his landlord' were not included therein:

"(5.) It shall be lawful for the tenant to remove all fruit trees and bushes planted by him on the holding and not permanently set out, but if the tenant shall not remove such fruit trees or bushes before the termination of his tenancy, such fruit trees or bushes shall remain the property of the landlord, and the tenant shall not be entitled to any compensation in respect thereof."

Sect. 4: "Where, under a lease current at the commencement of this Act, a holding is at that date in use or cultivation as a market garden with the knowledge of the landlord, and the tenant thereof has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation or removal is given to a tenant by this Act, then the provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden."

Sect. 6: "For the purposes of the principal Act and of this Act the expression 'market garden' shall mean a holding or that part of a holding which is cultivated wholly or mainly for the purpose of the trade or business of market gardening."

H. L. (Sc.) 1901 SMITH v. CALLANDER.

Gibson to be referee in respect of the whole claim. The respondent on December 17 presented a note of suspension and interdict against the appellant and Gibson, praying to have the former interdicted from insisting in, and the latter from proceeding with, the reference in so far as it related to the items claimed under the Market Gardeners Compensation Act; or otherwise to have the appellant so interdicted in so far as these items related to improvements executed prior to January 1, 1898. The Lord Ordinary refused to grant interim interdict. And on January 29 the referee issued a final award, by which he found the appellant entitled to 720*l.* 16*s.* as compensation in respect of the claim under the Market Gardeners Compensation Act. The respondent appealed to the sheriff. On March 7 leave to amend the record in the action was granted, to the effect of limiting the prayer in the alternative to an interdict in respect of improvements executed before January 1, 1898.

In the action the points relied on by the respondent were that the Act of 1897 only applied to improvements executed after January 1, 1898, when the Act came into force, and that, consequently, by far the larger part of the improvements for which the appellant claimed compensation, and which were admittedly executed before that date, were outside the statute. In his statement he set out the lease, to the effect that there should not be more than one-half of the lands in white crop at any time during the currency of the lease, the other half being always in grass fallow or green crop; that the lands should be left so that at the tenant's removal there should not be less than one-sixth in turnips; that there should never be two grain crops sown successively; that the tenant should be entitled to sell hay and potatoes grown on the farm, but, if he did so, he was bound to bring to the farm manure, at the rate of fifteen tons per acre, in place of what was sold; and, with the above exception, the tenant must not sell any straw, fodder, or chaff without the permission of the landlord. In statement 3 the respondent averred: "When the said lease was entered into, it was intended that the whole subjects should be occupied and treated as an ordinary arable farm. It was not

contemplated by either party that any part thereof should be occupied or treated as a market garden. Notwithstanding the terms of the said lease, however, the appellant, without any notice to or permission from the respondent, his landlord, about ten years ago began to use a portion of a field on the farm for growing raspberries and strawberries, and continued to do so until the expiry of the lease. The appellant's statements in answer are denied."

In his answer the appellant admitted that about fourteen years ago the appellant commenced to cultivate raspberries and strawberries, and that he has carried on that cultivation ever since, with the full personal knowledge of the respondent, and also with the personal knowledge of the successive factors on the estate, without objection from the respondent or any of said factors. It is common to grow market-garden crops on farms in the locality in which North Elphinstone is situated. It is the centre of a large market-garden industry, and many of the farms in the neighbourhood are partly cultivated as market gardens. Strawberries were grown on another part of the farm during the appellant's lease by a sub-tenant of the appellant, and permission was got from the respondent's factor to sub-let part of the farm for that purpose.

In statement 6 the respondent averred that he was quite willing that the appellant's claim in the first-named Act should be remitted to a referee, but that he objected to items claimed under the Act of 1897 being made the subject of the reference. To this the appellant answered, "Admitted that the greater portion of the improvements in question was executed prior to January 1, 1898." Explained that in his statement of facts in the process before the sheriff the respondent made the following averments: "About ten years ago the appellant, at his own hand, and without any notice to or permission from the landlord or his factor, began to use a portion of a field on the farm for growing raspberries and strawberries, and continued to do so until the expiry of his tenancy. At that time he had about twenty acres under such cultivation. The respondent did not think it necessary to interfere with the discretion of his tenant during the currency of the lease. He was unwilling to prevent

H. L. (Sc.) 1901 SMITH v. CALLANDER.

appellant from having the benefit of any extra profits which he could derive from the part of the farm cultivated in that way. The respondent relied on the appellant conforming with the terms of the lease before its expiry in the way of bringing back the lands to a shift or rotation in conformity with the provisions of the cropping clauses."

In the action the Lord Ordinary (Kyllachy), on March 15, 1900, interdicted the appellant from insisting in or prosecuting and following further the items of the pretended note of claim specified in the prayer of the note in so far as they related to alleged improvements executed prior to January 1, 1898. And on July 7, 1900, the Second Division of the Court of Session (1) affirmed this judgment.

May 9. *Haldane, K.C.*, and *E. H. Coles* (with them *A. J. Joseph*), for the appellant. The Act of 1897 refers to the Act of 1883, and, if the Acts be read together, then the Act of 1897 is retrospective, and the tenant who has made improvements during the lease, but prior to the Act of 1897, is entitled to compensation for such improvements. If the appellant can get the holding within s. 3 of the Act of 1897, then the improvements here claimed for are within Part III. of the schedule to the principal Act. And it is brought within s. 3 by s. 4. We have here all the elements required to bring the case within s. 4. The word "then" refers to the commencement of the Act, and means, if the tenant has already or before the commencement of the Act executed the improvements he is entitled to compensation for them: that is, to compensation for improvements executed before as well as after the Act.

Asquith, K.C. (with him *A. Orr Deas*, of the Scottish Bar), for the respondent. The improvements before 1898 here claimed for were improvements for which the landlord under the Act of 1883 could not have been made liable for unless under his written consent; therefore, it would require very strong words in the Act of 1897 to make him liable for things he saw growing, but for which he knew he was not liable to pay

(1) 2 F. 1140.

compensation. It is totally impossible to find a retrospective meaning in the Act of 1897. That Act in terms says it is to be prospective, for the Act is to come into force on January 1, 1898.

Haldane, K.C., in reply.

EARL OF HALSBURY L.C. My Lords, I cannot say that much doubt has been infused into my mind upon the subject of this case, which appears to me to be capable of very easy solution.

It appears to me that the effect of the Act of 1897 is very plain. In the first place, I think no rights were intended to be conferred upon anybody retrospectively. The language of the 3rd section seems to me to have a very plain meaning: "Where after the commencement of this Act it is agreed in writing that a holding shall be let or treated as a market garden," then certain "provisions shall have effect," and one of them is the 3rd sub-section, which enlarges Part III. of the schedule of the former Act. The effect of clause 4 also appears to me to be very plain. The Legislature is providing anew for the condition of things as applicable to market gardens, and it says after the commencement of this Act, where you have a written agreement, then certain conditions shall apply—this is all after the commencement of the Act; and then, apart from a written agreement, the case is provided for where, although there is no written agreement, "a holding is at that date" (that is to say, "at the commencement of this Act"; the word "then" follows immediately after, but I make no distinction between "the commencement of this Act" and the time referred to by "then") "in use or cultivation as a market garden," then without the intervention of a written agreement, which is the first case provided for, a tenant under a lease, unless he has received notice of dissent from his landlord, shall have the same right of compensation in respect of improvements as if there had been a written agreement: "the provisions of this Act shall apply in respect of such holding as if it had been agreed in writing after the commencement of this Act that the holding should be let or treated as a market garden." What is the

H. L. (Sc.) 1901 SMITH v. CALLANDER. Earl of Halsbury L.C.

effect of that? It does not say that he shall have compensation for everything that has been done upon the land since the commencement of the lease. What it says is that the provisions of the Act which have been specified shall apply as if it had been agreed in writing after the commencement of the Act that the holding should be let or treated as a market garden. Then what is the tenant to get? I turn back, and I find what is to happen in the event thus contemplated. Sect. 3 says, "the following provisions shall have effect." Those "following provisions" apply only (the contrary is hardly susceptible of argument) to improvements made since the date of the commencement of the Act. And that is the whole of the controversy.

My Lords, I entirely agree with the Lord Ordinary in his construction of the statute. It seems to me to be simply hopeless to attempt to read the language otherwise than as I have read it. One case contemplated by the framers of the statute is the case of a written agreement. The other case is that, at the time of the passing of the statute, the thing has already been done, and the condition of things is such that the tenant has already with the knowledge of the landlord cultivated the land as a market garden; the Act says that then "the same provisions shall apply," that is to say, that for all future improvements, although the landlord has not given his consent in writing, there shall be compensation at the end of the lease. That, my Lords, seems to me to be intelligible, reading the mere words as they stand, and I confess that, having listened to the long and ingenious argument submitted to us by Mr. Haldane, I have been unable to find anything that requires exposition or that is difficult of interpretation in the language of the statute so read. It appears to me that there is great difficulty in the construction which Mr. Haldane has suggested, and I think, as a mere matter of language and the construction of the words in the Act, it would be impossible to maintain it.

For these reasons, my Lords, I move your Lordships that the interlocutors appealed from be affirmed, and the appeal dismissed with costs.

LORD ASHBOURNE. My Lords, I entirely concur.

Of course, it is obviously competent for the Legislature, if it pleases, in its wisdom to make the provisions of an Act of Parliament retrospective; but before giving such a construction to an Act of Parliament one would require that it should either appear very clearly in the terms of the Act, or arise by necessary and distinct implication. Now, such reading as I have given to this short statute to my mind conveys very clearly that the provision on which the controversy arises is not retrospective. Clause 3 comes into operation where holdings are let as market gardens after the commencement of the Act, and the 4th section deals with the cases which are not covered by the 3rd section—that is, leases current at the date of the commencement of the Act. But, to prevent all misconception and to shew that it was not intended to go further in that direction, it says at the end of it that although the provisions of the Act are to attach to current leases under certain conditions, they are to do so as if there had been an agreement in writing made after the commencement of the Act, shewing that the governing words all through are, "after the commencement of the Act."

It is not necessary to go into any discussion of the meaning of the word "then," or any of the other topics that have been introduced. I agree with the construction given by the Lord Ordinary, and I assent to the motion which has been made by my noble and learned friend.

LORD SHAND. My Lords, I am of the same opinion. It is not necessary in my view of this case to invoke the rule or principle under which a right to claim payment on the part of a tenant for improvements made prior to the passing of an Act of Parliament, and so to give an improbable retrospective effect to the Act, must be given expressly or by necessary implication by the provisions of the statute. It seems to me there is here no ground to support the tenant's claim even by ingenious and strained interpretation of the sections of the statute.

For the reasons stated by the noble and learned Lord on the

H. L. (Sc.) 1901 SMITH v. CALLANDER. Lord Shand.

Woolsack, and by the Lord Ordinary in the note to his judgment, I agree that the meaning of the word "then" in s. 4 of of the statute of 1897 is "thereupon," or "thereafter," and that the clause includes and refers only to improvements made by the tenant after the date of the Act. But if this were not so, I think the result would be the same as found by the learned judges of the Second Division.

LORD DAVEY. My Lords, I am of the same opinion. I think it is important to observe that market gardens, as was pointed out by Mr. Haldane, are within the Act of 1883, and this Act of 1897 makes further and more beneficial provisions for market gardens by way of amendment of Parts I. and III. of the schedule to the previous Act. But those amendments are only made under certain conditions and in certain cases, and the question is, In what cases are those amendments to be made? Now, under s. 3 of the Act it is very clearly pointed out that the provisions of that section apply only "where after the commencement of this Act" there is an agreement "in writing that a holding shall be let or treated as a market garden"; that is to say, that, so far as the landlord is concerned, he does for the first time treat or let the land as market garden after the commencement of the Act. There, necessarily, the amendment can only come into operation as regards improvements which are made after the commencement of the Act.

Then, my Lords, under s. 4 the case is contemplated where there is "a lease current at the date of the commencement of the Act," under which land has in fact, with the knowledge of the landlord, but without his written consent or any written agreement, been treated as a market garden, and the tenant "has then executed thereon, without having received previously to the execution thereof any written notice of dissent by the landlord, any of the improvements in respect of which a right of compensation" "is given to a tenant by this Act, then the provisions of the Act shall apply" as if there had been a written agreement. My Lords, I should have thought that the meaning of that clause was sufficiently

obvious. It puts a market garden which has been allowed by the landlord to be treated as a market garden in the same position as regards this Act as if a written agreement had been made after the commencement of the Act to treat it as a market garden, but only on the condition that the tenant has "then executed thereon" improvements without having received from the landlord written notice of dissent. I am disposed to agree with the Lord Ordinary in construing the word "then" in that clause as meaning thereafter." It may be that the other meaning which Mr. Haldane attached to it, and which the Inner House have favoured, is more like the primâ facie meaning, but it is clearly capable of meaning "has thereupon," and I think the structure of the section requires it to mean that.

My Lords, I see no reason or sense whatever in making the previous execution of the improvements a condition of the Act coming into operation. If it had any meaning at all, it would rather, I think, have the effect of making old improvements within the Act, and not new improvements. However that may be, a stronger objection to reading it as Mr. Haldane read it is that it would put the landlord in the position of being liable to compensate for improvements by not having given a written notice of dissent at a time when he was not called upon to do so, as he could not, unless he gave his consent in writing to the improvement, be made liable.

For these reasons, my Lords, I think that those words mean "has thereupon executed"; and the scheme of the Act is shortly this—to amend the schedules as regards market gardens in the Act of 1883, first, as to what I may call new market gardens, in cases in which there is an agreement in writing made after the commencement of the Act to treat them as market gardens, and, secondly, as to all market gardens in respect of subsequent improvements, provided the landlord has not, after the passing of the Act, given a written notice that he will not be liable for those improvements. That seems to me to render consistent the construction of the Act, and it is the construction which I advise your Lordships to place upon it.

H. L. (Sc.) 1901 SMITH v. CALLANDER.

LORD BRAMPTON. My Lords, I entirely agree.

LORD ROBERTSON. My Lords, I also agree for the reasons which have been stated by the learned judges of the Second Division.

Interlocutors appealed from affirmed and appeal dismissed with costs.

Lords' Journals, May 9, 1901.

Agent for appellant: *H. C. Haldane, for Buik & Henderson, W.S., Edinburgh, and John Richardson, Solicitor, Musselburgh.*
Agents for respondent: *Grahames, Currey & Spens, for John C. Brodie & Sons, W.S., Edinburgh.*

[HOUSE OF LORDS.]

H. L. (E.) 1900 *July* 31.

PAYTON & CO., LIMITED . . . . . APPELLANTS;

AND

SNELLING, LAMPARD & CO., LIMITED RESPONDENTS.

Action for Passing Off—Calculated to Deceive—Functions of Judge and Witness respectively.

Observations by Lord Macnaghten on the respective functions of judge and witness in passing-off cases.

THE appellants were wholesale dealers in coffee, and had sold their "Royal Coffee" for many years under that name. In 1895 they began to sell it in canisters with labels and colours. The respondents were also wholesale dealers in coffee, and since 1897 sold their coffee, under the name of "Flag Coffee," in canisters with labels and colours which the appellants said were calculated to deceive purchasers into the belief that they were buying the appellants' coffee. The appellants brought an action against the respondents and claimed an injunction. Witnesses as to the nature and effect of the alleged imitation were called on both sides. Byrne J. who tried the action

treated it as " a pure question of fact " and granted an injunction. (1) The Court of Appeal (Lindley M.R., Sir F. Jeune, and Romer L.J.) also treated the question as one entirely of fact, and reversed the decision of Byrne J. and dismissed the action. In this House their Lordships affirmed the Court of Appeal and on the same ground. (2) These decisions are not proper subjects for a report in these Reports. But it is believed that the publication of Lord Macnaghten's and Lord Davey's observations may be useful.

1900. July 26, 30, 31. *Warmington, Q.C.*, and *John Cutler, Q.C.* (*Sebastian* with them), for the appellants.

Swinfen Eady, Q.C., *Birrell, Q.C.*, and *Micklem, Q.C.*, for the respondents, were not heard.

LORD MACNAGHTEN. My Lords, to my mind this is a very plain case, and there is very little to be said about it. The appellants (who were the plaintiffs) and the defendants were both wholesale dealers in coffee, and the appellants seek to restrain the defendants from passing off their goods as and for the goods of the plaintiffs, and they also seek an injunction to restrain the defendants from selling their goods in tins or canisters so got up as by colourable imitation or otherwise to lead the public to suppose that the coffee contained in those tins is the plaintiffs' coffee.

Now, my Lords, in the mass of evidence which to a very great extent, in my opinion, is absolutely irrelevant, there are three things which stand out clearly. In the first place, the defendants did not, as it seems to me, pass off or attempt to pass off their goods as the goods of the plaintiffs. I think—and I say so in consequence of some remarks which were made by the learned counsel who addressed us last—the defendants are perfectly honest traders, and I do not see the slightest ground for suspecting them of any intention or design or wish to steal the trade of the plaintiffs.

In the next place, it is perfectly clear that no human being has been deceived. There is not a single instance of any person

(1) 16 Rep. Pat. Cas. 283. (2) 17 Rep. Pat. Cas. 48, 628.

H. L. (E.) 1900 PAYTON & Co. v. SNELLING, LAMPARD & Co. Lord Macnaghten.

wishing to buy "Royal Coffee" buying "Flag Coffee" instead through any mistake of any sort. Mr. Warmington accounted for that by saying, "Oh, we were bound to institute proceedings at the earliest possible moment"; but if persons come to the Court under an apprehension of that sort they are still bound to make out their case. It will not do to say, "We were frightened by what might happen, and, therefore, you must stop the thing in limine."

The third thing which is perfectly clear on the evidence is this: that as regards the plaintiffs' goods, if they have acquired a title and denomination in the market, the only title and denomination which they can have acquired is that of "Royal Coffee," while as regards the defendants' goods, if they have acquired or should acquire a title in the market, it is or will be the title of "Flag Coffee."

Now, when a person comes forward to restrain a colourable imitation of this sort in a case like this, and when he cannot prove that the defendants have tried to steal his trade, he has to make out beyond all question that the goods are so got up as to be calculated to deceive. The principle is perfectly clear —no man is entitled to sell his goods as the goods of another person. The difficulty lies in the application, and, when it is a case of colourable imitation, I think it is very desirable to bear in mind what Lord Cranworth said on one occasion —that no general rule can be laid down as to what is a colourable imitation or not; you must deal with each case as it arises, and have regard to the circumstances of the particular case.

My Lords, having said that, I really think I have said enough. I know there are differences between the tins of the plaintiffs and the tins of the defendants. There are some minor differences; but the main difference is that one is distinctly labelled "Royal Coffee" and the other is distinctly labelled "Flag Coffee." The minor differences I do not propose to go into. They satisfy me that the defendants had no intention of stealing the plaintiffs' trade. Beyond that I do not think it worth while to refer to them. The main distinction, as I have said, is between "Flag Coffee" and "Royal Coffee." Nobody

has been deceived, and I do not think any one will be deceived. Suppose a person goes into a shop with a vague idea of having seen something pretty and attractive at some time or other, if you could trace the history of that impression on his mind back to the very first moment it got there, it may be you would find that it was derived from "Royal Coffee" and not from "Flag Coffee"; but if he chooses to take "Flag Coffee" instead of "Royal Coffee," there is no deception on the part of the defendants that I can see at all.

One word with regard to the evidence I should like to say. I think, as I have said before, that a great deal of the evidence is absolutely irrelevant, and I do not myself altogether approve of the way in which the questions were put to the witnesses. They were put in the form of leading questions, and the witnesses were asked whether a person going into a shop as a customer would be likely to be deceived, and they said they thought he would. But that is not a matter for the witness; it is for the judge. The judge, looking at the exhibits before him and also paying due attention to the evidence adduced, must not surrender his own independent judgment to any witness.

Then, my Lords, there is another remark I should like to make on the evidence. The witnesses were over and over again asked whether, considering the get-up of the "Royal Coffee" and the "Flag Coffee" was somewhat similar, or very similar, it would not enable a dishonest trader to pass off the one for the other, and the witness said, "Oh yes—it could be done very easily; he could wrap it up in paper or put his hand over it." Now, in the first place, I do not see why these wholesale traders should accuse retail traders of a fraud of that sort, or why one retail trader should impute to other retail traders fraud of that kind. And for fraud of that kind the defendants are not responsible. I think the whole of that evidence may be put on one side, because we know what would happen if a man came into a shop and asked for "Royal Coffee" and the tradesman had no "Royal Coffee" upon his shelf; he would not take down "Flag Coffee" and wrap it up in paper, passing his hand over it so as to conceal what he was

H. L. (E.) 1900 PAYTON & Co. v. SNELLING, LAMPARD & Co. Lord Macnaghten.

doing. What he would do would be to say, "I have not got 'Royal Coffee,' but I have some coffee quite as good; will you take 'Flag Coffee' at just the same price, or a very little dearer? It is quite as good or perhaps a little better." In 99 cases out of 100 the customer would take it. There is no deception there.

My Lords, I do not think I need weary your Lordships in going through what has been put forward as evidence. I entirely agree with the judgments in the Court of Appeal, and particularly with the very instructive judgment of Romer L.J. I move your Lordships that this appeal be dismissed with costs.

LORD DAVEY. My Lords, I so entirely agree with what my noble and learned friend has just said as to the judgments in the Court of Appeal that I will not trouble your Lordships at any length—I merely wish to point out the position in which this case comes before us.

My Lords, for many years the defendants have used three colours, red, blue, and green, with paper labels for a particular kind of French coffee which they call their "Le May's Coffee"; they have used red, blue, and green labels for the purpose of wrapping up their goods in them. The plaintiffs have the same range of colours, but they are rather differently arranged: I think the defendants' first is green, and the plaintiffs' red. So far forth as the colours are concerned there cannot be the slightest ground for saying that the defendants have in any way imitated the range of colours of the plaintiffs. It is unnecessary to say more, because there is not, in my opinion, a scintilla of evidence to be found in this case of anything like intentional or conscious deception on the part of the defendants.

Now, my Lords, in order to see the sort of case that is put forward, I want to look for one moment at the evidence by which this case of "calculated to deceive" is supported. I think you will find if you examine it closely that it all turns upon the colours. For instance, I take a witness whose evidence is to be found on page 82—his name is Boraston. He

is asked at question 754, "Do you think if they had been accustomed to fetch coffee in blue tins without asking for 'Royal' coffee, that a dishonest salesman could give them 'Flag' coffee when they thought they would have got the 'Royal' coffee?" The answer is, "Yes, I do; and in the case of a child or a servant very probably, if the mistress discovered it when they got it home, they would not trouble to take it back again."

Now, my Lords, I take the witness Poole. In the course of his examination-in-chief he is asked by the learned judge at question 790, "That would apply, whatever the pattern was, so long as it was the red and white tin?" He says, "I do not think the public would stop long enough to look at the window —as long as it was red and white they would go in and say, 'I want another tin.'" Then he is asked, "That applies, then, whatever the pattern of it was, as long as it was red and white?" His answer is, "Red and white, and the design." "(*Q.*) And so with the blue. If they got the blue they would look at it and see it was blue and white? (*A.*) Yes, my Lord. (*Q.*) What you have been telling us would apply to any pattern which was upon it as long as they took the general colours? (*A.*) The colours and the design and the lettering. (*Q.*) I thought you told me just now that they would not notice it as long as it was red and white? (*A.*) Red and white. (*Q.*) The particular pattern or device they would not notice? (*A.*) They would not notice them." And then at the end of this gentleman's cross-examination, at p. 91, he is asked the question to which my noble and learned friend at my side (Lord Brampton) drew attention: Suppose "a person came into your shop and asked for the 'Royal,' he would not then be satisfied with the 'Flag'? (*A.*) If he had had the 'Royal' before, and if I happened to reach the 'Flag' down and then wrapped it up, he would take it, and just notice the colour and go away."

My Lords, that is a sample, and I think not an unfair sample, of the kind of evidence by which it is pressed upon your Lordships in this case that the apprehended deception or passing off of goods is supported. In my opinion, I agree entirely with my noble and learned friend, and with the learned

H. L. (E.) 1900

PAYTON & Co. v. SNELLING, LAMPARD & Co.

judges in the Court below, that it is utterly insufficient to make out any such case.

LORD JAMES OF HEREFORD. My Lords, I concur.

LORD BRAMPTON. My Lords, I entirely concur.

LORD ROBERTSON. My Lords, I agree.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 31, 1900.

Solicitors: *Seymour Salaman, Townroe & Co.; E. Flux & Leadbitter.*

[PRIVY COUNCIL.]

MINISTER FOR LANDS . . . . . APPELLANT;

AND

WILSON . . . . . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

J. C.*
1900
Dec. 4, 5.
1901
March 2.

Crown Lands Acts, 1884, *ss.* 20, 26; 1889, *ss.* 5, 8, *sub-s.* 6—*Inquiry as to falsity of Statements by Applicant for Conditional Purchase—Powers of Land Board—Findings of Fact by Land Court final—Power to reserve Points of Law—Jurisdiction of Supreme Court.*

A Land Board and a Land Appeal Court having found, on an inquiry directed by the Minister for Lands under s. 20 of the Crown Lands Act of 1884, that certain statements made by the respondent in applying for a conditional purchase were false within the meaning of s. 26:—

Held, on a special case submitted to the Supreme Court under s. 8, sub-s. 6, of the Crown Lands Act of 1889:

(1.) that the jurisdiction of the Supreme Court is confined to the decision of submitted questions of law.

(2.) that the decision on questions of fact by the Land Board or by the Land Appeal Court is final and conclusive.

(3.) that the inquiry directed was within the cognizance of the Land Board under s. 20 of the Act of 1884.

(4.) that the Land Appeal Court has power to review the finding of the Land Board, and as incident thereto to reject irrelevant evidence, draw reasonable inferences of fact, correct errors and shortcomings of the Board; to act as a Court of rehearing as well as of appeal.

Under s. 5 of the Act of 1889 and No. 7 of the Crown Lands Regulations of December 2, 1889, the Minister for Lands can order the inquiry to be held at any place that he may think fit.

APPEAL from an order of the Supreme Court (May 5, 1899) setting aside concurrent decisions and findings of the Gunnedah Land Board and of the Land Appeal Court on a reference under s. 20 of the Crown Lands Act of 1884 (48 Vict. No. 18) of a question of "voidance or forfeiture" of a conditional purchase under the Crown Lands Acts. The case was one of fifteen, in which similar decisions had been given by local Land

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

J. C. 1901

MINISTER FOR LANDS v. WILSON.

Boards as to selections (comprising in the whole 30,000 acres) on the "resumed area" of a pastoral station called Mercadool.

Questions of forfeiture arise in connection with conditional purchases. By s. 121 of the Act of 1884 all transactions, with intent or having the effect of enabling any person other than the applicant for a conditional purchase to acquire by purchase or otherwise the land applied for, are illegal. Under s. 26 of the same Act and the regulations in force before the passing of the Crown Lands Act, 1895, the applicant was required to declare: (1.) That he intended to use the land applied for solely for his own use and benefit. (2.) That there was no agreement or arrangement by which any person other than himself could acquire any interest in or obtain the use of the land applied for. (3.) That there was no understanding between him and any other person that would tend to defeat or evade the provisions of the law as to conditional purchases. And by the same 26th section of the Act of 1884 it is enacted that, if any person shall make a false statement in such declaration as to any of the matters contained therein, he shall forfeit all moneys paid by him in respect of the land applied for, and all right and title to such land, and that any conveyance, transfer, mortgage, or disposition of such land made by such person shall be null and void if taken with notice or knowledge of such false statement. By s. 135 of the same Act, on proof by inquiry before the Land Board that any written statement, statutory declaration, or evidence on oath has been made or given for the purpose of misleading any officer or person in the exercise of his duty under the Act, or that such statement, declaration, or evidence wilfully misrepresents facts, any conditional purchase in connection with which the same was made or given may be declared by the Minister to be forfeited.

On February 12, 1891, the respondent Wilson applied for a conditional purchase of 640 acres in the said "resumed area" of Mercadool. "Resumed areas" are lands withdrawn under the Crown Land Acts from the old pastoral stations or "runs" so as to be available for settlers desiring to take up land for residential and farming purposes. Wilson made the

declaration containing the statements (1.), (2.), and (3.) above set out, and became conditional purchaser of an area of 347 acres.

On September 3, 1895, it was referred by the Minister for Lands to the Walgett Local Land Board to decide whether Wilson's statements were false within s. 26 of the Act of 1884. On January 2, 1896, the Minister, under s. 5 of the Act of 1889 (53 Vict. No. 21), directed the local Land Board at Gunnedah to hold the investigation, and further referred a question whether Wilson's mortgagee had taken with notice of the false statements. There was an adjournment to Sydney owing to an essential witness being unable without danger to his life to be examined elsewhere.

On April 13, 1896, the Land Board found that Wilson's statements, (1.), (2.) and (3.) were false, and that the mortgage was taken with notice thereof.

The Land Appeal Court affirmed this finding, and thereafter stated and restated a special case for the consideration of the Supreme Court, as mentioned in their Lordships' judgment.

On May 5, 1899, the Supreme Court made an order which, without answering any of the questions submitted, directed that the respondent's appeal be allowed with costs. The Court held that the Land Board had no power to sit at Sydney, and that the course pursued by the Board in taking the two references together, as well as their mode of conducting it, constituted a "mistrial," and was "contrary to natural justice" and a "denial of justice."

Asquith, Q.C., and *Vaughan Hawkins*, for the appellant, contended that the Supreme Court had no jurisdiction to make an order in the terms of that appealed from. The judges of the Supreme Court had treated the matters referred as if an appeal had been given to them generally from the Land Appeal Court. But special tribunals are created under the Crown Land Laws for dealing with questions such as those which have arisen in this case, and so far from any appeal being given to the Supreme Court, the limit of its powers is that it can only decide questions of law which have already been raised in the

J. C.
1901
MINISTER FOR LANDS v. WILSON.

Land Court, and by it at the instance of the parties referred to the Supreme Court. Local Land Boards were established by the Act of 1884. By ss. 11 and 20 every Board is to determine all complaints and other matters brought before it, conduct inquiries, and give decisions. By s. 20 any question of forfeiture may be referred by the Minister to the Board, whose decision is final unless appealed from to the Land Court. By s. 5 of the Act of 1889 the Minister can direct any Land Board to inquire and decide without regard to the district in which the land lies, and jurisdiction is thereupon given to the Board. By regulation 7 of December 2, 1889, and regulation 19 of June 3, 1895, the Minister has power to direct where the proceedings are to be held. An appeal lies to the Land Court, which has power to take fresh evidence: s. 8, sub-s. 3, of the Act of 1889. It can also remit cases to be further dealt with by the Land Board: see s. 14, sub-s. 6, of Act of 1884, and s. 8, sub-s. 4, of Act of 1889. By s. 8, sub-s. 5, of the Act of 1889 the decision of the Land Court is, subject to s. 6, to be final and conclusive; but sub-s. 6 provides for a reference to the Supreme Court on a point of law. See on these Acts, *Hill, Clark & Co.* v. *Dalgety* (1), *Garnsey* v. *Flood* (2), and *Attorney-General for New South Wales* v. *Walters.* (3) In view of the foregoing sections it was submitted that the Gunnedah Local Land Board had power with the Minister's sanction to hold an inquiry at Sydney, and had jurisdiction generally to proceed as it had done. As regards the question whether there had been a mistrial, that was not a question of law, and ought not to be answered at all, or, if answered, to be answered in the negative: *Noble* v. *Ahier* (4); *Combe* v. *De La Bere* (5); *Blackwood* v. *London Bank of Australia.* (6)

Sir E. Clarke, Q.C., and *Adams* (*Upjohn, Q.C.*, with them), for the respondent, contended that the Gunnedah Land Board had no jurisdiction either to investigate or to decide the matters which were referred to it by the appellant. They were matters which under the Acts of 1884 and 1889 the Minister

(1) [1898] A. C. 343.
(2) [1898] A. C. 687.
(3) [1898] A. C. 460.
(4) (1886) 11 P. D. 158, 163.
(5) (1882) 22 Ch. D. 316, 326, 343.
(6) (1874) L. R. 5 P. C. 92.

J. C.
1901
MINISTER FOR LANDS v. WILSON.

for Lands had no power to refer to any local Land Board, and which no local Land Board had power to deal with. If the Minister had such power he exercised it on September 3, 1895, by referring the matters in question to the Walgett Land Board and thereby exhausted his powers. He had no authority under the Acts to revoke that reference, nor while such reference existed could he refer the same matters to the Gunnedah or any other local Land Board. Further, it was contended that on the true construction of the sections cited on the other side, the Gunnedah Land Board, even if lawfully in possession of the reference, had no power to adjourn its proceedings and sit and take evidence and pronounce its judgment at Sydney, which was a place outside its jurisdiction. They referred to analogous cases in England, and in particular to the County Courts Act, 1888, s. 9, and Rules under the Judicature Act, and three cases thereunder, which shew that rules are made to carry out an Act, not to extend it: *In re Mills' Estate* (1); *Longman* v. *East* (2); *Armstrong* v. *Mills*. (3) They relied also upon various errors in procedure by the Board, such as mixing up together the two references, one as to the respondent, the other as to his mortgagees; the improper admission and rejection of evidence. If the matters in question were cognizable by a local Land Board at all, the Land Board ought to decide them with all proper evidence and no inadmissible evidence before it. When the Land Appeal Court found that evidence had been improperly received and rejected, it ought to have set aside the findings of the Board, and had no jurisdiction to adjudicate in the circumstances. The Supreme Court was right and its judgment should be affirmed.

Vaughan Hawkins replied.

1901
March 2.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This is an appeal from an order pronounced by the Supreme Court of New South Wales upon the hearing of a special case stated by the Land Appeal Court for the purpose of determining certain questions arising in a case

(1) (1886) 34 Ch. D. 24. (2) (1877) 3 C. P. D. 156.
(3) [1893] A. C. 627.

J.C. 1901 MINISTER FOR LANDS v. WILSON.

before that Court brought by way of appeal by the respondent, James Wilson, from a decision of the local Land Board of Gunnedah.

The Gunnedah Land Board was directed by the Minister for Lands, under s. 20 of the Crown Lands Act of 1884, to investigate and decide the question whether certain statements made by the said James Wilson on his application for a conditional purchase of lands in the land district of Walgett, which was in part successful, were false within the meaning of s. 26 of the Act, and also whether a certain deposition made by him in support of those statements was misleading within the meaning of s. 135. The Gunnedah Land Board was also directed by a subsequent order under s. 20 to investigate and decide the question whether the Assets Realization and General Finance Company, Limited, who claimed to be mortgagees of the land conditionally purchased, took their alleged mortgage with notice or knowledge of the false statements, if any, made by Wilson.

The Gunnedah Land Board determined to hold their investigation into the several questions referred to them at one and the same time and as parts of one and the same inquiry. For this purpose the Board sat at Gunnedah on January 31, 1896, and on several days following. They then adjourned to Sydney with the sanction of the Minister for Lands, and continued and completed the inquiry there. The hearing occupied forty-seven days in all.

On April 13, 1896, the Board gave their decision at Sydney. They found that Wilson's statements were false and that the Assets Realization and General Finance Company, Limited, took their alleged security with notice and knowledge of the falsity of those statements.

From that finding the mortgagees did not appeal. Wilson appealed to the Land Appeal Court. After an argument which lasted sixteen days, that Court affirmed the finding of the Land Board against Wilson, and dismissed his appeal.

Thereupon at Wilson's instance the Land Appeal Court, under s. 8, sub-s. 6, of the Crown Lands Act of 1889, stated and submitted to the Supreme Court of New South Wales a

special case setting forth the following questions as questions of law :—

"1. Whether the Gunnedah Local Land Board had jurisdiction to inquire into the 'matters' referred to them?

"2. Whether the proceedings before the said Board did or did not amount to a mistrial, or were or were not contrary to natural justice, or did or did not amount to a denial of justice?

"3. Whether, under the circumstances" set forth in the special case, "the Land Appeal Court could lawfully reject from the said Board's finding all matters considered by the said Court not to be relevant" to the first reference, "and after rejecting the evidence held to have been wrongfully admitted could lawfully decide on the evidence held relevant to the reference?

"4. Whether, in regard to the evidence held to be properly before the Court, the Land Appeal Court possesses the power or right to draw inferences analogous to that possessed by a single judge in bankruptcy or equity?"

The special case came on for argument on November 15, 1897, and the three following days. Then it was referred back to the Land Appeal Court to be restated. It does not, however, appear on the record for what reasons the case was referred back or in what respects it was amended. It came on for argument again on November 1, 1898; it was further heard during two days in February, 1899, and four days in the following March. On May 5, 1899, the Court, consisting of Darley C.J. and Owen and Simpson JJ., made an order simply directing that the appeal of the said James Wilson be allowed with costs.

Although the order of the Supreme Court does not answer specifically the questions submitted for decision, the views of the learned judges upon those questions are apparent from their judgments. Darley C.J. was prepared to answer the first, second, and fourth questions in the affirmative, and the third question in the negative. Owen J. answered the first and second questions in the affirmative, and gave no answers to the third and fourth. Simpson J. also answered the first and second questions in the affirmative. He gave no answer

J. C. 1901 MINISTER FOR LANDS v. WILSON.

to the fourth question, but he added that he thought "it was almost impossible for the Land Court to adopt with any satisfactory result the course referred to in the third question."

Now, the Supreme Court is not a Court of Appeal from a Land Appeal Court. Still less is it a Court of Appeal from a local Land Board. The jurisdiction of the Supreme Court under the Crown Lands Act of 1889 is confined to giving a decision upon such questions of law as may be submitted to it by the Land Appeal Court. With questions of fact it is not concerned. The investigation and decision of all questions of fact on a reference under the Act of 1884 is committed to the Land Board subject to an appeal to the Land Appeal Court, on which, by leave of the Court, fresh evidence may be admitted. The decision of the Land Board if there is no appeal, or the decision of the Land Appeal Court on appeal, subject only to the opinion of the Supreme Court on questions of law arising in the case and submitted by the Land Appeal Court to the Supreme Court, is by statute made final and conclusive.

Questions 1, 3, and 4 may be disposed of in a very few words.

As regards question 4, assuming that a question as to the capacity and competence of the Court itself is a "question of law arising in a case before the Land Appeal Court" within the meaning of s. 8, sub-s. 6, of the Crown Lands Act of 1889, it seems to be rather like solemn trifling to inquire whether a tribunal which possesses the jurisdiction and holds the position of the Land Appeal Court has the power of drawing reasonable inferences of fact from evidence properly before it. Without that power no Court or judge whose duty it is to review evidence could hope to deal with questions of fact.

Question 3 seems to answer itself. Every tribunal which has to review the findings of an inferior Court must have the power of rejecting or disregarding evidence which it deems irrelevant. The mere fact that the irrelevant matter is vastly in excess of that which is relevant does not of itself increase the difficulty. Special care may perhaps be required in sifting the materials before the Court lest something of value should be overlooked in the mass of irrelevant rubbish. But the

difficulty, whatever it may be, is involved in the duty imposed upon the Land Appeal Court by statute, a duty which it is not competent for the Court to decline, even though it may seem to be beyond the strength of any tribunal but the highest in the land.

As regards question 1, the learned Chief Justice doubts whether the Legislature could really have intended to impose upon a lay tribunal such as a Land Board the duty of determining questions of so great nicety and difficulty as those supposed to be involved in the second reference to the Land Board of Gunnedah. It is enough to say that it appears to their Lordships, as it appeared to the learned judges of the Supreme Court who were associated with the Chief Justice, that the language of s. 20 of the Crown Lands Act of 1884 is perfectly clear, and that both the inquiries referred to the Land Board by the Minister for Lands are within the express words of the section.

There remains question 2. That question in its terms is general and somewhat vague. Many of the points which the Supreme Court took to be within it may be laid aside. Neither the Supreme Court, acting under the provisions of the Act of 1889, nor this Board has any power to correct the errors or shortcomings of a local Land Board. That duty belongs to the Land Appeal Court. If there was an error in treating the two references as parts of one and the same inquiry, that error has been corrected by the proper Court. But their Lordships may observe in passing that they are not satisfied that there was any error in the procedure of the Land Board in this particular matter. Obviously the mortgagees were interested in maintaining Wilson's conditional purchase. Obviously Wilson was interested in upholding the security of his mortgagees whether his interest in the land was or was not liable to forfeiture. If the Crown had been suing in equity for a declaration that the purchase was void, and the mortgage void, too, on the ground of fraud, both the purchaser and the mortgagees must have been made parties to one and the same suit. In the present case, as it seems to their Lordships, it was merely a question of convenience whether the two references

J. C. 1901 MINISTER FOR LANDS v. WILSON.

should be taken separately or together, and their Lordships cannot say that the Land Board was wrong in the course which it adopted, though the inquiry may have been conducted in a manner which does not reflect much credit on those by whom it was prosecuted. Then there were questions raised, but not pressed before the Land Appeal Court or their Lordships, as to evidence received and evidence rejected by the Land Board. Again, these questions were for the Land Appeal Court, and the Land Appeal Court seems to have dealt with the matter properly. It was said that some evidence which Wilson might or would have given was shut out by the Land Board. No doubt the Land Board was wrong in this matter; but Wilson's case does not seem to have been prejudiced in the slightest degree by this error, and there can be no doubt that if Wilson's counsel had applied to the Land Appeal Court to take his answers on the questions which were not admitted by the Land Board, the Land Appeal Court would have assented to that course. But it would have been a very idle and injudicious application, and, naturally enough, no such application was made.

Putting aside the question as to the sitting at Sydney, with which their Lordships will deal presently, it seems hardly accurate to speak of the proceedings before the Land Board as a mistrial as if the inquiry had been a trial before a jury in a case in which miscarriage would necessitate a new trial before another jury. The Land Appeal Court is a Court of rehearing as well as a Court of Appeal, and unless the whole proceedings before the Land Board were a nullity from beginning to end, there would be no necessity for the Land Appeal Court or the Minister for Lands to remit the inquiry to the same or to another Land Board.

The question whether it was competent for the Land Board of Gunnedah, with the sanction of the Minister for Lands, to sit at Sydney, is a question of importance and of some difficulty. But their Lordships are of opinion that the Land Appeal Court came to a right conclusion on the point.

The question turns upon the true meaning and effect of s. 5 of the Crown Lands Act of 1889, and the regulations made in

pursuance of that Act. These regulations were made under the powers of s. 53 of the Act, which authorizes the Governor "for the purpose of carrying the Act into full effect" to make regulations "which shall, upon being published in the *Gazette*, be good and valid in the law."

Sect. 5 of the Act of 1889, so far as is material, is in the following words:—

"5. It shall be lawful for the Minister from time to time to direct any local Land Board to deal with any matter, question, or inquiry that has arisen, or shall arise, without regard to the Land Board district or land district in which the land forming the subject of such matter, question, or inquiry may be situated. And the said Land Board shall have as full power and jurisdiction to deal with the matter as if the land aforesaid were situated within that Board's proper Land Board district or land district."

The meaning of that section seems tolerably plain. When any question arises as to any land, wherever it may be situated, the Minister for Lands, if he thinks proper, may put aside the Land Board of the district which would in ordinary course be called upon to deal with the question and refer the matter to any Land Board he may select. So far there is nothing to limit or govern his choice as between one Land Board and another. When a Land Board is selected to try a question that has arisen outside its own district, it is to have the same power of dealing with that question as if the land were within the area of its local jurisdiction; but the Act does not require or suggest that the land "forming the subject" of the inquiry is to be regarded as annexed to or incorporated with the Board's proper district, and that the Board is to proceed upon that footing. The members of the Land Board selected for the occasion are simply in the position of Commissioners duly appointed by competent authority to conduct a particular inquiry. If the Commission is silent as to the place of sitting, it would be for the Commissioners to hold their inquiry where they found it most convenient. In the present case the Act says nothing about the place of sitting. The omission, if it be an omission, is supplied by the regulations made by the

J. C.
1901
MINISTER FOR LANDS v. WILSON.

Governor under the powers of the Act. That is just one of those details which regulations framed to carry the Act into full effect are intended to supply. The regulation in question is No. 7 of the Crown Lands Regulations, gazetted on December 2, 1889. That regulation provides that "all proceedings in open court shall be holden at some convenient place within the land district wherein the land forming the subject of investigation is situated unless the Minister otherwise allow or direct." These words taken in their natural and ordinary signification seem to give the Minister for Lands power to direct the inquiry to be held, or to sanction its being held, at any place he may think fit. It seems to their Lordships that there is no reason for narrowing the meaning of the language used. It was said that such a power might be used oppressively. Any discretionary power may be abused, but it seems to their Lordships that even a power so wide as this may safely be committed to a Minister of the Crown responsible to Parliament. Then it was urged that the Act and the regulation merely empower the Minister for Lands to direct the inquiry to be held in one of several districts forming a Land Board district, though the district selected may not be the one in which the subject of the inquiry may be situated. Their Lordships, however, think that this is too narrow a construction and they cannot accept it. It would practically limit the choice of the Minister to Land Boards in the vicinity of the land the subject of the inquiry, and it would give the Minister no choice at all as to the place of sitting except in the case of a Land Board "for several land districts."

In the result their Lordships are of opinion that the order of the Supreme Court must be discharged, and that the case should be remitted to the Land Appeal Court with an intimation that questions 1, 3, and 4 ought to have been answered in the affirmative, and that so far as it is necessary or proper to answer question 2, that question should be answered by stating that it was competent for the Land Board, with the sanction of the Minister for Lands, to hold their sittings in Sydney. Their Lordships will humbly advise His Majesty accordingly.

The respondent must pay the costs in the Supreme Court and the costs of this appeal.

J. C.
1901
MINISTER FOR LANDS v. WILSON.

Solicitors for appellant: *Light & Galbraith.*
Solicitor for respondent: *George Slade.*

[PRIVY COUNCIL.]

LIVINGSTONE . . . . . PLAINTIFF;

AND

ROSS . . . . . DEFENDANT.

J. C.*
1900
Nov. 29, 30.
1901
Feb. 16.

ON APPEAL FROM THE COURT OF QUEEN'S BENCH FOR LOWER CANADA, IN THE PROVINCE OF QUEBEC (APPEAL SIDE).

Contract—Construction—Agency.

In an action by the appellant for a declaration that he was entitled as purchaser to a conveyance from the respondent of the property in suit:—

Held, on consideration of all its terms and of the surrounding circumstances, that the agreement sued upon was not a vendor and purchaser agreement, but an agency agreement; that the appellant never came under any personal liability, present or future, to purchase, the arrangement contemplated being on behalf of third parties who might thereafter be accepted by the respondent.

APPEAL from a decree of the above Court (Nov. 11, 1899), reversing a decree of the Superior Court at Quebec (June 30, 1899).

The question decided was as to the construction and effect of a certain contract between the appellant and respondent, which is set out in their Lordships' judgment, as also are the circumstances under which it was made.

The suit was by the appellant to obtain a conveyance to him by the respondent of the property comprised in the contract, alleging that thereby the respondent had undertaken to sell it to him at his option for the consideration therein mentioned.

The respondent pleaded that the contract was not and was never intended to be an option in favour of the appellant, but

* *Present:* LORD HOBHOUSE, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

J. C. 1901 LIVINGSTONE v. ROSS.

that it constituted solely a brokerage contract by which the appellant was authorized to sell specifically to persons named, or to other persons who might be approved by the respondent.

The Superior Court adopted the appellant's view and ordered the execution of the conveyance; the effect of its judgment being to vest title in the appellant, and to direct payment to the respondent of the purchase-money, leaving all other matters open to adjustment.

The Appellate Court reversed this decision, and dismissed the suit. One reason assigned was that the appellant had not fulfilled any of the conditions of the contract within the time specified, and that the respondent was accordingly at the expiration of that time relieved of his obligation to sell. Another was that the appellant was only a mandatory or agent, and that he could not accept the offer for himself.

Blake, Q.C., and *M'Master, Q.C.*, for the appellant, contended that the letter of August 23, 1897, is in its terms an offer and promise of sale to the appellant of certain property. It was optional with him either to accept the offer himself as principal, or to offer and sell the property to others and thereby earn a commission. It is not in terms an authorization to sell. It is rather a direct offer to sell to him personally. In the contract there was a reservation to the respondent of the right to saw and move certain logs and lumber unless otherwise arranged by the sale of them to the appellant. The offer and the reservation must be read together, and pointed to the appellant being the contemplated purchaser of the mill and the reserved logs, and, if so, of all the property. The appellant duly accepted the respondent's offer within the time limited. The respondent at first acquiesced in his acceptance, and only after a delay raised the point that only third parties were entitled to the benefit of the contract. The appellant fulfilled all his obligations under the contract; and if the respondent was dissatisfied with the amount tendered, he could have demanded the whole purchase-money "in cash or equal thereto," and the appellant on such demand being made would have complied with it.

G. G. Stuart, Q.C., and *Lafleur, Q.C.*, for the respondent,

contended that on the terms of the contract, construed in reference to all the surrounding circumstances, the respondent never undertook to sell the property to the appellant, and never contemplated accepting him as purchaser. The letter of August 23 was a mere brokerage contract. Under it the appellant was authorized to sell the respondent's property to any purchasers whom the respondent might approve and thereby earn his commission. The appellant never sold the property under this authority; and if he were under the terms of the contract entitled to buy personally, he wholly failed to fulfil the conditions precedent which would have entitled him to a conveyance either within the time specified or at all. He has wholly failed to establish a cause of action.

Blake, Q.C., replied.

1901 *Feb.* 16.

The judgment of their Lordships was delivered by

SIR FORD NORTH. The appellant Livingstone, who is described in his case as an accountant of modest means, but enjoying the confidence of financial men, obtained a judgment against the respondent Ross in the Superior Court of the city of Quebec, declaring that he was entitled as purchaser to a conveyance from Ross of the Buckingham property hereinafter described. Ross was the surviving partner of the firm of Ross Brothers, who were owners of that and other property; and Ross was winding up the business of that firm. The judgment above referred to in favour of Livingstone was reversed by the Court of Queen's Bench of the Province of Quebec (Appeal Side), and Livingstone's action was dismissed with costs. Hence this appeal by him.

Livingstone's claim to a conveyance of that property was founded upon the following letter from Ross to him, which he contended gave him an option to purchase it for himself:—

"Mr. John Livingstone,
"105, Temple Buildings,
"Montreal. "Quebec,
"23rd August, 1897.

"Dear Sir,—We hereby agree to sell and convey all our rights and titles to lands, timber limits, farms, water powers,

J. C. 1901 LIVINGSTONE v. ROSS.

slides, joint interest in slides with Maclaren, new saw-mill, store and stores goods, crops, shanty supplies and keep over, goods, booms, piers, houses, workshops, all equipments and appurtenances, horses, cattle, and all utensils and effects of every kind other than saw logs and sawn lumber, the whole situate in the county of Ottawa."

Further details were then given, which it is unnecessary to state verbatim; but they included a new saw-mill and machinery, a machine shop fitted with lathes, planes, and other wood-working machinery; blacksmith's and carpenter's shops and tools; a farm of 600 acres; and also slides, booms, piers, chains, rigging, and every equipment or appurtenance belonging to the said mill and properties, described or not, and 1400 square miles timber limits (therein described by reference) on which were large supplies of standing timber. The letter then proceeded:—

"The whole of the said properties, movable and immovable, belonging to the concern, whether described or not, except as aforesaid, for the sum of 130,000 dollars. Terms—Cash or equal thereto, with interest thereon or any part thereof at 4 per cent. per annum; $30,000 to be paid at even time with the execution of the deeds of conveyance and not later than the 15th January next, and not less than $30,000 each year thereafter in semi-annual payments of $15,000 until the whole amount with interest is paid.

"The said saw-mill is quite new, and its capacity is about 170,000 feet per day.

"We to have reasonable and sufficient time to saw and move said logs and timber with use of plant and means of handling free of charge, but at our own expense, unless otherwise arranged by sale of such to you.

"You to have reasonable and sufficient time, not exceeding three months from the 1st Sept. next, for correspondence and communication with foreign and near correspondents; and for inquiry, explanation, exploration, and for arrangements for development, the said offer not prejudiced by the continuance of the business as a going business by us, pending the arrangements by you for completing sale.

"Two and a half per cent. commission payable to you on the said sum after completing sale.

"Yours truly,

"(Signed) Ross Bros.,

"In Liq.

"All outlays in connection with logging for next year's business to be borne by purchasers."

On November 29 Livingstone wrote and sent the following letter, which was delivered to Ross on the next day :—

"Frank Ross, Esq., 105, Temple Buildings,
"Messrs. Ross Bros. in liq. Montreal,
"29th Nov., 1897.

"Dear Sir,—For answer to yours of the 23rd of August last, delivered to me by you, in your office in Quebec, on that date, I beg to say I accept the offer and agreement therein.

"Yours truly,

"John Livingstone."

Livingstone alleges that by this letter the relation of vendor and purchaser was constituted between Ross and himself.

To that letter Ross replied as follows :—

"Mr. John Livingstone,
"105, Temple Buildings, Quebec,
"Montreal. 6th Dec., 1897.

"Dear Sir,—In reply to yours of the 29th ult., I cannot accept such notification as binding on me. You have given me no principal in the transactions on whom I have any hold; and you are simply a broker in the matter, so far as my dealings with you. However I am anxious to sell, and will consider any proposition later on you may put before me on behalf of responsible buyers.

"I remain, yours very truly,

"Frank Ross."

Ross's contention is that there never was any question of sale or purchase between Livingstone and himself at all; that he never offered to sell to Livingstone, who was admittedly a

J. C. 1901 LIVINGSTONE v. ROSS.

person of no means; that Livingstone was merely employed by him as his agent to find a person or persons of means willing to buy the property from Ross on the terms contained in the letter of August 23; and if he did succeed in bringing about such a sale he was to be paid a commission of 2½ per cent. on the purchase-money after the sale was completed.

It is necessary now to consider carefully the letter of August 23, and ascertain what are the rights of the parties thereunder. The opening words of that letter are, "We hereby agree to sell and convey" without saying to whom. If the sale was intended to be to Livingstone alone, as he contends, is it credible that when he prepared this letter for Ross to sign he would have omitted to insert here the words "to you" which are found in the passage giving him the right to a commission?

Then there is the provision as to three months' delay from September 1 (which has already been read). What was that for? Obviously to give Livingstone the opportunity of finding at home or abroad responsible persons to examine and explore, and, if satisfied, to purchase the property, and thus earning his commission. Such delay for the purposes mentioned would have been quite unnecessary if Livingstone were to be the purchaser, for he had known the property for years. Then at the end of that paragraph is the provision that Ross may carry on the business pending the *arrangements by you* for completing the sale. What were these arrangements? The finding of substantial persons willing to buy and to comply with the conditions of the letter. If Livingstone had been sole purchaser, the arrangements he would have had to make would be to complete the *purchase*, not the sale.

Again, the passage at the end of the letter, as to the outlay in connection with logging for next year's business being borne by the purchasers, is entirely inconsistent with Livingstone's contention that he was to be the sole purchaser.

One other portion of this letter was relied upon by both sides. The saw logs and sawn timber were expressly excluded from the property sold; and a subsequent passage in the letter provides "we" (i.e. Ross) "to have reasonable and sufficient

time to saw and move them, &c., unless otherwise arranged by sale of such to you." The counsel of both Livingstone and Ross in the Courts below seem to have assumed that "to you" meant to Livingstone personally, and the judges apparently accepted that view. Proceeding upon that basis, Livingstone's counsel contended that it was not business to suppose that Livingstone should be an agent merely for the sale to others of the saw-mills and machinery and at the same time should be personally the purchaser of the logs and timber, which could only be prepared for the market by the use of those mills. But this is doing violence to the terms of the letter. Livingstone did not, in fact, agree to purchase the logs and timber. The letter provides that they are to be the property of Ross, unless some subsequent arrangement should be made for the sale of them to "you"; and certainly the person or persons referred to would never make any such subsequent arrangement without first seeing some way to having the logs dressed and forwarded to market at a fair profit.

The use that Ross's counsel made of this passage was to say that where, as here, a sale to Livingstone personally is meant, the words "to you" are inserted; and as they are not found in the opening words of the letter, a sale to Livingstone could not have been meant there.

There is one overriding answer to all criticisms upon this passage. In their Lordships' opinion the words "the sale of such to you" does not mean to Livingstone personally. Looking at the agreement as a whole, it clearly is not a vendor and purchaser agreement, but an agency agreement; and it would be wholly altering the position of the parties to read it as Livingstone desires us to do. The phrase "to you" means to the persons whom Livingstone might find to buy the property; and it has the same meaning as if the phrase had been "to your parties, your friends, your syndicate, your purchasers," or the like. One must not expect to find legal accuracy of drafting in a letter which is the joint production of an accountant and timber merchant; but the meaning is obvious.

It is a satisfaction to their Lordships to find that the view

J. C. 1901 LIVINGSTONE v. ROSS.

they have arrived at as to the legal construction of this paragraph of the letter corresponds exactly with Livingstone's own view of its meaning before he fell into the hands of his legal advisers. He never considered that he had come under any personal liability, present or future, to purchase the timber and logs; on the contrary, the possible future arrangement to purchase them was on behalf of those who he then contemplated would acquire the property.

One other clause remains for consideration—one of the utmost importance. It supplies the keynote to the whole. It is the provision for 2½ per cent. commission being payable to Livingstone on the purchase-money after the completion of the sale—a phrase already made the subject of comment. This provision as to commission is in their Lordships' opinion absolutely inconsistent with Livingstone's contention. It shews that he was an agent for sale to be paid by commission, and not a purchaser. His counsel suggested that "discount" probably was intended when commission was mentioned; but the suggestion that an accountant did not know the difference between commission and discount, or confused one with the other, is too large a draft on their Lordships' credulity. Moreover, discount would be an abatement made from the purchase-money in favour of the purchaser, in the course of completing the purchase; whereas this commission is made payable, after completion of the sale, to the vendor's agent.

But if there could be any doubt as to the construction of that letter, standing alone, a reference to the surrounding circumstances makes the matter still clearer.

Livingstone in his pleadings refers to certain dealings between Ross and himself in 1894 as to this very same property, and contends that Ross gave him an option to purchase it in 1894, and did the same again in 1897.

On October 30, 1894, Livingstone wrote to Ross with respect to certain large American capitalists who contemplated a considerable expenditure on mills at Buckingham and elsewhere, and stated that he was requested to get three months' option to enable them to have the limits explored and to get expert's reports on the water powers, and added, "You can trust me

that no misuse will be made of the options: that the business is bonâ fide and the combination one of the strongest in the United States."

On November 5 Livingstone wrote again to Ross asking for two letters for the two properties, Buckingham and Ouiatchouan, and continued, "You can make me the private holder of the options as a trustee"; and added, "The whole matter would be strictly private, until ready to close or bring you together."

On November 14, 1894, Ross replied to Livingtone:—

"We hereby give you an option on our Buckingham property for three months for $250,000 cash or equal thereto—purchasers to pay in addition all the costs of this winter's output of logs."

Then followed a general description of the property; and the letter concluded as follows:—

"Trusting this information will be of some use, but if the intending buyers wish to send explorers I will do all I can to aid them."

These negotiations led to nothing, and the matter dropped for a time; but it is idle to suggest that under those letters Livingstone could have elected to take the property himself, and could have compelled Ross to convey it to him.

The subject of a sale of this property was brought up again by Livingstone in the following letter:—

"Confidential.

"Frank Ross, Esq., Quebec. Rosedale, Toronto,
"2nd August, 1897.

"Dear Sir,—Owing to the owner of the Jacques Cartier property being in a lunatic asylum, and two of his brothers shrinking from exposing this in Court, on an application for a factor, as was contemplated, to give a title thereto, I may be able to induce those who proposed joining in the purchase of that property to become purchasers of your Lièvre property, though larger than contemplated. Now please do say the very lowest at which you will sell as before described with interest vesting in you as you contemplated in 1894. If your reply justifies the expense, and I can leave a very sick wife, I will be

J. C. 1901 LIVINGSTONE v. ROSS.

down; and if the Ouiatchouan is unsold I may get the same parties to go in for the latter, if not the former, for development at once.

"Yours truly,

"John Livingstone."

The property there called the Lièvre property is the same as the Buckingham property.

It is difficult to appreciate exactly the meaning of the phrase "with interest vesting in you as you contemplated in 1894"; but it seems to treat the two transactions as of a similar nature, and certainly does not indicate how a man who was merely an agent for sale in 1894 could be a purchaser on his own account in 1897. And one thing is quite clear, that the proposed purchasers referred to in the letter of August 2 did not mean or include Livingstone.

The next step was that about August 20, in consequence of that letter, Ross and Livingstone met in Montreal, and had some conversation about the property; and then Livingstone drafted the letter dated August 23, and brought it over to Ross at Quebec; and it was altered on one or two points, and was then signed by Ross.

Reference may here be made to Livingstone's own statements as to the position he occupied in the transaction. In one place in the record he says "it was distinctly understood I was to syndicate the property. I was to get others that were financially responsible and obtain the deed for the property." And in another he says, "the terms were cash or equal to cash, and the understanding was that I was to have associated with me parties who could carry it out."

Certain letters were written by Livingstone to Ross during the three months' delay, dated October 25 and 27 and November 12, 1897. It is not worth while stopping to read them; but they are just the letters an agent for sale would write to his principal. There is not a word in them as to Livingstone being purchaser; but there are references in two of them to the syndicate he was trying to form.

Their Lordships have no doubt as to the meaning and effect of the letter of August 23. It was an employment by Ross of

Livingstone as his agent to find substantial persons willing to purchase the Buckingham property upon the terms and within the time mentioned in that letter, and if he succeeded Livingstone was to have a commission of 2½ per cent. upon the purchase-money after completing the sale. If no sale was effected, there would be no commission. If before any purchaser had been found and accepted Ross had desired to revoke the employment of Livingstone to sell, he might have done so, as he could not be bound as vendor when there was not any purchaser; but whether under those circumstances Livingstone could have obtained payment for any work he had done under a quantum meruit, or could have recovered against Ross in an action for damages for depriving him of the opportunity of earning his commission, might depend upon the circumstances under which the employment was revoked. But there is one thing which that letter clearly is not, namely, an offer or authority under which the agent, employed for commission to sell for the vendor, could himself become the purchaser.

In support of his contention that he was himself the purchaser, Livingstone relies upon a conversation with Ross on December 1, and a letter from Ross to his own manager Parker on December 14, alleging that upon each of those occasions Ross recognised and adopted the purchase by Livingstone individually. With respect to the conversation, there seems some doubt whether it is admissible in evidence under the Code, except so far as relates to the statements by Ross, which would not help Livingstone. But, assuming it to be admissible, there is nothing in it. Although Ross refused altogether from the first to accept the impecunious accountant personally as purchaser, he was still willing and anxious to sell his property on the terms mentioned in the letter of August 23, although the three months had expired; and this was expressly stated by him at the interview of December 1, and in his letter dated December 6 already read; and it was such a sale as this that he referred to as still possible. Then, as to the letter from Ross to Parker, it contains this passage: "Livingstone has been down, and says he will be prepared to pay over the money on or before the 15th of January. Would you please draw up

J. C. 1901 LIVINGSTONE v. ROSS.

particulars of all the lands and lots which now belong to the concern, so that I would be prepared to act if I see fit." It is the fact that Livingstone had said he would be prepared to pay over the whole purchase-money by January 15; but even then Ross does not admit that he would be bound to sell to Livingstone, but wishes to be in a position to act, if he should think fit. It may be that if the $130,000 had been paid down in cash on the day named Ross would have been content to convey even to Livingstone; but the proposal for payment of the whole purchase-money on January 15 was very soon dropped. Livingstone could not raise the money. He had not even promises for the whole by January 15.

Having regard to their Lordships' decision as to the construction of the letter of August 23, the rest of the case is not very material; but as it was very fully argued here it may be shortly dealt with. After that letter was signed Livingstone did attempt to find buyers, and had negotiations with Messrs. Blackwell and the Wilsons, father and son, who would have been responsible purchasers. They, however, after a time refused to entertain the proposals. Livingstone then attempted to get some other persons to take the matter up; but time was running short, and these negotiations were far from being completed by the end of November. Expecting them to go through ultimately, but being apprehensive that if no purchasers were found by the end of November the whole matter might collapse, Livingstone tried to keep it alive by giving in his own name as the purchaser. He then continued his negotiations with his friends, and by the middle of January had found several persons who, it is not disputed, would have been responsible purchasers, if they had come forward as such. This, however, was not the case. These persons did sign a memorandum between Livingstone and themselves, by which they agreed with Livingstone personally that they would find part of the money required. But Ross was not a party to that instrument, and could not have made any claim thereunder against the persons who signed it. They would not come under any obligation whatever to Ross. Then, on January 15, Livingstone made a tender of $30,000, and claimed to have a

conveyance of the property made to himself alone; but he did not tender any deed for execution, nor make any provision for payment of the balance in cash or equal to cash, leaving Ross's claim for the balance of the purchase-money, and also for the outlay in connection with logging for the next year's business, to rest solely on the personal liability of Livingstone, who was not worth that amount or anything like it. Ross had never refused to sell the property on the terms of the letter of August 23; he was willing down to the last to sell and convey to solvent and responsible purchasers who would become personally liable to him; but this demand by Livingstone for a conveyance to himself alone, leaving him the only person liable to Ross for the $100,000 balance of the purchase-money and for the logging outlay, was too much. Ross, therefore, the time for completion being up, chose to treat the whole matter as between himself and Livingstone as at an end; and in their Lordships' opinion he was justified in so doing.

They will therefore humbly advise His Majesty that this appeal should be dismissed. The appellant must pay the respondent's costs.

Solicitor for appellant: *S. V. Blake.*
Solicitors for respondent: *Harwood & Stephenson.*

[PRIVY COUNCIL.]

J. C.* 1901 *Feb.* 12; *March* 2.

SCOTTISH PROVIDENT INSTITUTION. APPELLANTS;

AND

THE COMMISSIONER OF TAXES . RESPONDENT.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Victorian Income Tax Act, 1895, *ss.* 5, 10—*Construction—Investments by Company in the Colony—Taxable Income.*

Sect. 10 of the Victorian Income Tax Act, 1895, provides a special mode of computing taxable income in favour of those companies which, not having their principal office or place of business in Victoria, nevertheless have part of their "receipts or assets, and liabilities" within the Colony:—

Held, that by the true construction of that section, the appellant company, in order to have the benefit thereof, must shew that it carries on part of its trade in the Colony; the above expression representing the component parts of a trading company's balance-sheet:

Held, further, that the appellant being a mutual insurance company which did not insure or otherwise trade in the Colony, but only invested certain funds there, was not within the section. Its income derived from its Victorian investments was taxable income under s. 5 in the mode applicable to taxpayers generally.

APPEAL from an order of the Supreme Court (Dec. 11, 1899) upon a special case stated by the judge of the county courts at Melbourne sitting under the Victorian Income Tax Act of 1895 (No. 1374).

The appellants had taken certain objections to assessments made upon them by the respondent under the Act for the years ending December 31, 1895, 1896, 1897, and 1898 respectively. They had been assessed for income tax for those four years on the whole interest received from their investments in Victoria during that time. Their objections were:—

(1.) That the investing of funds being an essential part of the business of the institution, and in itself the carrying on of a business or trade, the institution should be assessed under

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

s. 5 (*a*) of the Act as upon income derived from personal exertion, and not under s. 5 (*b*) as upon income derived from property.

(2.) That the taxable income of the institution falls to be ascertained under the provisions of s. 10 of the Act of 1895.

(3.) That no dividend having been declared by the institution during the years in question, there is, in terms of s. 10 of the Act of 1895, no taxable income for the said years available for assessment.

The county court judge made the following finding of facts :—

(1.) That the Scottish Provident Institution did not for any of the years in dispute set apart or make available for being paid, credited, distributed, or used for the purpose of dividend any sum whatever ;

(2.) That it is a necessary part of the business of every company carried on for the purpose of mutual life assurance to invest its funds ;

(3.) That the Scottish Provident Institution is carried on for the purpose of mutual life assurance, and does invest its funds in the Colony of Victoria ;

(4.) That the Scottish Provident Institution does not carry on any business in Victoria unless the investment of its funds there amounts to a carrying on business in Victoria.

He referred the construction of the Act to the Supreme Court, which decided that s. 10 did not apply to the appellants, but that the company must be taxed as an ordinary person.

A. Graham Murray, K.C., and *R. L. Blackburn*, for the appellants, contended that they had no income liable to assessment in Victoria for the years in question. They were a company within the meaning of s. 10 of the Act of 1895, and their taxable income was the amount set apart for dividends. If the section only applied to companies trading within the Colony, it was contended that the investment of money was a necessary part of the business or trade of the company. The trade was that of a mutual insurance company. It was established by a deed of constitution in 1837, and incorporated by 11 & 12 Vict. c. 106, amended by later Acts, with a principal

J. C.
1901
SCOTTISH PROVIDENT INSTITUTION v. COMMISSIONER OF TAXES.

office in Edinburgh. Every assured becomes a member of the institution. The premiums are calculated on the footing that each premium when paid begins to earn compound interest. The investment of its funds becomes an essential part of the company's trading, for premiums and interest on investments form the fund with which it discharges its liabilities. It is contrary to the whole scheme and policy of the Act that the company should be taxed on the same footing as a private individual. The scheme of the Act was to encourage companies to trade in the Colony. It exempts companies which make it their principal place of business; by s. 10 it favours in a less degree those who carry on a part of their business therein. On its true construction the appellants' case falls within that section. Reference was made to ss. 2, 5, 7, 8, sub-s. 1, and 10 of the Act of 1895; and see *England* v. *Webb* (1), relating to the same company; *In re Income Tax Acts* (2), where the Court took a view opposed to that which it took in this case.

Haldane, *K.C.*, *Bray*, *K.C.*, and *Rowlatt*, for the respondent, contended that the only income of the appellants in Victoria was the produce of property within s. 5 (*b*) of the Act of 1895; and was taxable thereunder. Sect. 10 has no application to income derived from the produce of property by a company which does not carry on any of its business, which was that of life assurance, in the Colony, but merely invested there a portion of its funds. In respect of such income the company is assessable as a "person" under s. 5. It does not come within the scope of s. 10, which was to encourage companies to carry on their trade in the Colony. This company does not differ from any private owner of property. It does not carry on a special trade for the benefit of the Colony, but merely invests its money there in a way common to all persons who have funds in hand for that purpose.

Graham Murray, *K.C.*, replied.

1901
March 2.

The judgment of their Lordships was delivered by

LORD ROBERTSON. The appellant company has certain investments in Victoria, in the form of (1.) money invested on

(1) [1898] A. C. 758. (2) (1898) 23 Vict. L. R. 574.

mortgage and (2.) lands acquired through foreclosure of mortgages. The present question is as to the mode in which the income derived from those investments is to be assessed to income tax in Victoria; and it depends on the soundness or unsoundness of the appellants' claim that their institution comes within the 10th section of the Victorian Income Tax Act of 1895. That section provides in the case (as the appellants hold) of all companies whatsoever, or (as the respondent, the Commissioner of Taxes, holds) in the case only of companies trading within the Colony, a mode of computing the taxable income more complicated and less onerous than that applicable to taxpayers generally under s. 5 of the Act.

The original theory of the appellants had been that their company was entirely exempt from income tax, by reason of the 7th section of the same Act; but this claim was rejected by the Judicial Committee on a former appeal, to which reference will subsequently be made.

The facts are free from controversy. The Scottish Provident Institution is a Scottish mutual insurance company. Its trade is that of insurance, and it has also trafficked to some extent in reversions. Neither in insurance nor in reversions has it dealt at all in Victoria. Its sole connection with Victoria is that it has property there. It "does not," as the special case expressly finds, "carry on any business in Victoria, unless the investment of its funds there amounts to a carrying on of business in Victoria."

The income arising from those investments must be held primâ facie (and this the appellants admit, for the sake of argument at least) to fall under the 5th section, which is the general taxing section; and the appellants' whole contention is that their institution is one entitled to that mode of computing the taxable income which is set forth in s. 10. Now it must be allowed to the appellants that in this Victorian statute the Legislature has greatly favoured companies as distinguished from individuals. From reasons apparently of economic policy, companies have been virtually invited to settle in the Colony and aid in the development of its resources; for companies which have their principal office or place of business in Victoria

J. C. 1901 SCOTTISH PROVIDENT INSTITUTION v. COMMISSIONER OF TAXES.

pay no income tax at all, although an individual carrying on the same trade enjoys no similar privilege. In like manner, though in less degree, s. 10, even assuming it to have the narrower meaning contended for by the respondent, allows certain companies having their principal office or place of business out of Victoria to calculate their taxable income in a more favourable mode than is allowed to an individual trading under similar conditions. The question remains, however, whether this privilege applies to all companies, whether trading within the Colony or not, or only to those trading within it; and their Lordships are of opinion that the more limited construction of the section is the sound one.

The other sections which relate to the question are the second and the fifth, and, in order to give fair play to the appellants' argument, it is well to advert to these before examining the terms of the 10th section, which is directly and immediately in hand. The second, which is the interpretation clause, declares that "person" includes every company, except a company whose head or principal office or principal place of business is in Victoria, and "company" includes every corporate body howsoever incorporated, and whether under the laws of Victoria or any other country, and whether its head or principal place of business is in Victoria or elsewhere. Now, it is plain enough that when these interpretations are applied to the 5th section, the appellants' company is found to be subjected to the tax derived from the produce of property within Victoria. The appellants maintain that the same interpretation of the word "company," being applied to s. 10, procures them admission to its privileges, and they argue that it is illegitimate to ascribe to the word "company" a shifting sense where no restriction of the meaning is expressly imposed.

The words of s. 10 are as follows:—

"(1.) For the purposes of this Act the income of a company not having its head or principal office or principal place of business in Victoria shall be deemed to be income liable to tax, and the taxable income of a company shall be such amount as the company sets apart or makes available for being paid, credited, distributed, or used for the purposes of dividend.

"(2.) In the case of companies which have not their head or principal office or principal place of business in Victoria, the company shall, on or before the 31st day of March in every year, furnish to the Commissioner a return in the prescribed form and containing the prescribed particulars.

"(3.) Such return shall be verified by a declaration under the hand of and made by the public officer of such company, or if there be no such officer then under and by the principal officer of such company in Victoria, shewing the total amount of the receipts or assets and liabilities (as may be prescribed) of the company during the year ended on the previous 31st day of December, the amount of such receipts or assets and liabilities (as may be prescribed) in Victoria during that year, the amount of all dividends declared by the company during that year, and the dates when they were respectively declared.

"(4.) So much of the total dividends declared by the company during the year as is proportionate to the amount of the receipts or assets and liabilities (as may be prescribed) of the company in Victoria during the year as compared with the total receipts or assets and liabilities (as may be prescribed) of the company during the year shall be deemed to be the income of such company which is chargeable with tax."

Now, when this section is examined, with especial regard to the 3rd and 4th sub-sections, it appears that the companies to which the provisions are capable of application are companies which have some part of their "receipts or assets and liabilities" outside Victoria, and some part of their "receipts or assets and liabilities" within Victoria. It is equally clear that those words "receipts or assets and liabilities" represent the component parts of a complete balance-sheet of a trading company. Accordingly, the hypothesis of this scheme of computing income is that there must be trade in Victoria, just as there is trade out of Victoria. Their Lordships, therefore, consider that s. 10 is, from its essential condition, applicable only to some of the companies "included" in the application of the word "company" which is permitted by the interpretation clause—to wit, companies carrying on trade in Victoria,

J. C. 1901

SCOTTISH PROVIDENT INSTITUTION v. COMMISSIONER OF TAXES.

although not having their principal office or place of business there.

While founding their judgment on the terms of s. 10, their Lordships consider this conclusion to be supported by the decision in *England* v. *Webb* (1) already referred to. For while it is true, as pointed out by the Lord Advocate, that the question there arose under s. 7, and that the definition of "company" did not directly enter the argument, yet the general considerations which led their Lordships to adopt the more restricted application of the exemption apply, by a parity of reasoning, to the present case.

The appellants advanced an alternative argument, which their Lordships cannot accept, as a valid objection to the judgment. They anxiously maintained that, in fact, they carried on business in Victoria by holding investments there; and they founded on the second finding in the special case that "it is a necessary part of the business of every company carried on for the purpose of mutual life assurance to invest its funds." That this is true could not be doubted, even if the proposition were not a finding in a special case; but it falls short of what is required for the appellants' argument. The investment of their funds somewhere is an operation incidental to the appellants' trade, as it is in the case of every trader using capital in his business; but their trade is not to invest but to insure. The 10th section does not use the word "business" (except about principal place of business) as affording any criterion of what the companies it treats of are supposed to be doing in the Colony, and their Lordships have considered that it requires those companies to be trading there. Now, the holding of investments is not the trade of the appellants.

Their Lordships will humbly advise His Majesty to dismiss the appeal, and the appellants must pay the costs of the Appeal.

Solicitors for appellants: *Currey & Hawkins.*
Solicitors for respondent: *Freshfields.*

(1) [1898] A. C. 758.

[PRIVY COUNCIL.]

MINISTER OF MINES . . . . . DEFENDANT; J. C.*

AND 1901

HARNEY AND OTHERS . . . . . PLAINTIFFS. *Feb.* 12; *March* 23.

ON APPEAL FROM THE SUPREME COURT OF WESTERN AUSTRALIA.

Law of Western Australia — Goldfields Act, 1886 — *Regulations of* 1892, *clauses* 69, 70 — *Forfeiture of Lease—Notice of Forfeiture to Lessee.*

The decision of the Governor in Council, under clauses 69 and 70 of the Regulations of 1892, to forfeit a lease granted under the Goldfields Act of 1886, must be unequivocally expressed by some overt act:—

Held, that its transmission to the Warden's office was not such an act, and that the decision did not take effect till the day on which it was notified to the lessee.

The seven days' preferent right granted to the applicant for forfeiture by clause 69 to apply for a lease of part of the forfeited land runs from the date of notification: if exercised before that date, the application is invalid and of no effect.

After the expiry of the seven days the respondents applied for a lease of the same land, which had been included in an invalid previous application; the Governor gazetted his approval thereof, and subsequently cancelled the same on the ground of mistake:—

Held, that the cancellation was ultra vires, and that the Governor was liable in damages to the respondents on their petition of right.

APPEAL from an order of the Supreme Court (June 26, 1899) affirming an order of Hensman J. (April 19, 1899) which awarded to the respondents 8000*l.* damages and costs.

The question decided was as to the date at which the forfeiture of two leases granted under the Goldfields Act, 1886, took effect, whether from the date of the Governor's decision to forfeit them, or from the date on which his decision was notified to the lessee.

The facts and the proceedings are stated in the judgment of their Lordships.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

J. C.
1901
MINISTER OF MINES v. HARNEY.

Two years before the petition of right was filed the Court of Mining Appeal, consisting of three judges of the Supreme Court, and constituted by the Act of 1895, had decided, on a special case submitted in regard to the same lands by the Warden, that forfeiture took effect on its notification to the lessee.

Both Courts below, in disposing of the petition of right, treated this decision as right, and, as no new facts had arisen since, they refused to reconsider it.

Haldane, *K.C.*, and *G. Lawrence*, for the appellant, contended that the forfeiture in question was completed by the decision of the Governor approving the forfeiture; or in the alternative by the communication of his decision to the Warden. On one or other of those dates the lands became vacant Crown lands, and Austin, the original applicant for forfeiture, acquired a preferent right to apply for a lease thereof. At all events, the respondents' subsequent application for the same lease was void ab initio, no right of application being conferred on them by the Act. So also was the Governor's approval, and he accordingly had a right to cancel it. That cancelment was in the nature of a judicial decision, and did not give a right of action either in tort, contract, or otherwise.

Bucknill and *Spence*, for the respondents, were not heard.

1901
March 23.

The judgment of their Lordships was delivered by

LORD DAVEY. The real and only question on this appeal is from what date the cancellation by the Government of Western Australia of two gold mining leases formerly held by the respondent Ramsden took effect. The solution of this question involves the consideration of certain sections of the Goldfields Act of 1886 and two clauses of the Regulations of 1892 made under the provisions of that Act.

In September, 1895, the respondent Ramsden was the lessee from the Crown of two areas of land in the East Coolgardie Goldfield. These leases were granted under the power for that purpose contained in s. 10 of the Act of 1886. This section was repealed by s. 3 of the Goldfields Act of 1895, by which its

provisions were re-enacted with some variations. By s. 12 of the Act of 1886 every mining lease issued under that Act or the regulations was to contain a condition that if the lessee, his executors, &c., should fail at any time during the term to fulfil the conditions or terms therein contained, or to use the land bonâ fide for the purpose for which it should be demised, the lease should for any such failure be avoidable at the will of the Governor. By s. 29 the Governor was empowered to appoint an officer called a Warden, and by s. 31 to establish on any goldfield one or more courts, to be presided over and holden by a Warden, which should be a court of record and have jurisdiction to hear and determine all actions, suits, claims, demands, disputes, and questions which might arise in relation to mining. By s. 79 the Governor in Council was empowered to make regulations for the purpose of giving effect to the Act and for the management of goldfields generally.

The Goldfields Act of 1886 was repealed by an Act of 1895, which came into force on January 1, 1896; but the regulations made under the Act of 1886 remained in force until May 1, 1896, when they were superseded by regulations made under the powers of the later Act.

Clauses 69 and 70 of the Regulations of 1892 are as follows:—

"(69.) Any miner giving notice to the Warden of a goldfield that a lease or ground held under application for lease is not being worked in accordance with these regulations, and applying for the forfeiture thereof, shall, in the event of such lease or application being forfeited, have a preferent right for seven clear working days after such forfeiture to take possession of the ground so forfeited or any portion thereof as a claim, or to apply for the same as a lease.

"(70.) Each application for forfeiture of a lease shall be heard by the Warden in open Court, and the evidence taken at the hearing, together with his report recommending the approval of the forfeiture or otherwise (which report shall be read in open Court to the parties concerned) shall be forwarded to the Minister for the decision of the Governor in Council immediately after the hearing of the case."

J. C.
1901
MINISTER OF MINES
v.
HARNEY.

On September 18, 1895, one William Austin applied under the regulations to the Warden for the forfeiture of Ramsden's leases on the ground of non-compliance with the labour conditions contained in them. The application was heard in the Warden's Court at Kalgoorlie on October 16, 1895, with the result that the Warden recommended the forfeiture of both leases. On November 26, 1895, the Governor in Council approved the forfeiture as recommended by the Warden, and on the following January 14, 1896, notice of the Governor's decision was sent to the Warden.

This notice seems to have lain unheeded in the Warden's office, and no notice of the Governor's decision was at that time given to either Ramsden or Austin. Austin, however, appears to have learnt that the decision had been given by search in the Mines Department at Perth on January 28, 1896. He thereupon on February 1, 1896, pegged out the two pieces of land, and by application dated and registered February 7, 1896, he applied for leases of them to himself. It should be mentioned that by s. 44 of the Act of 1895, which was then in force, the applicant who shall have first taken possession of and marked out the land has priority of title.

At length, on February 21, 1896, the Mining Registrar at Kalgoorlie forwarded written notice of the Governor's decision of November 26, 1895, by registered letter to both Ramsden and Austin, but, owing to the envelope being misdirected, Austin did not receive the notice until March 20, 1896.

On March 2, 1896, Ramsden pegged out the same two pieces of land, and on March 9 he and the other two respondents applied for leases, having on March 3 lodged an objection to Austin's application.

On April 10, 1896, the Warden before whom the applications came stated a special case for the opinion of the Supreme Court on the following question of law:—

"Whether the forfeiture referred to in clause 69 of the regulations takes place, or the seven days' preferent right therein referred to begins to run, from date of decision of the Governor in Council declaring the lease or ground forfeited, or does the said preferent right begin to run from the date that

such decision is first communicated by the local registrar's office to the applicant for forfeiture?"

Two other points were also raised by the case, but they are not material to this appeal.

On May 5, 1896, the special case came before Hensman J., one of the judges of the Supreme Court, who gave his opinion that the forfeiture took place, and the preferent right began to run from the date when notice of the decision of the Governor in Council was communicated to the lessee (Ramsden).

On the same date the respondents' applications for leases of March 9, 1896, were recommended by the Cabinet, and on May 15, 1896, the approval of the Governor in Council of such application was gazetted pursuant to the regulations then in force. On June 3, however, on the recommendation of the Minister of Mines, the Cabinet advised the Governor to approve the cancellation of the respondents' approved applications for leases, and on July 10, 1896, the Governor's approval of such cancellation was gazetted.

On June 6, 1896, the Warden stated another special case for the opinion of the Court of Mining Appeal on the following point:—

From what date does the seven days' preferent right given by clause 69 begin to run?

This special case was heard before the Chief Justice and Hensman and Stone JJ. The two first-named judges held that the seven days ran from February 22, on which day the notice in the ordinary course of post would have reached the lessee. Stone J. thought that the time ran from the date on which the Governor's decision was communicated to the Warden, on the grounds that it was not required of the Warden that he should give notice to either party, and it was for the parties themselves by search or inquiry at the Warden's office to ascertain the fact. But in deference to previous decisions the learned judge waived his opinion.

On July 10, 1896, the Government approved Austin's application, and on the 24th of the same month the approval of the Governor in Council was gazetted.

J. C. 1901 MINISTER OF MINES v. HARNEY.

Austin entered into possession, and thereupon an action of trespass was commenced against him by the respondents. It was heard before Hensman J., who gave judgment for the plaintiffs (the present respondents), but his decison was reversed by the Full Court (Hensman J. dissenting). In other words, the decision was that Austin's title to the leases could not be attacked in an action by the respondents.

On July 26, 1898, the proceedings out of which the present appeal has arisen were commenced by the respondents against the appellant by petition of right for damages for breach of an agreement by the Government to grant the leases, or alternatively for wrongful cancellation of the two approvals of the respondents' applications. The appellant by his defence pleaded that Austin had a preferential right to apply for leases, and pursuant thereto he on February 1, 1896, marked out and took possession of the lands, and that the approval of the Governor of Ramsden's application was given by mistake and owing to the misrepresentation of Ramsden that the lands were unoccupied Crown lands, and that Ramsden's application being therefore null and void, the approval thereof by the Governor was of no effect.

It was not contended by the defence or before their Lordships that, assuming the regularity of Ramsden's application, there was any power in the Governor to cancel his approval thereof in the circumstances, or in the manner in which he had done so.

This action also came on for trial before Hensman J., who on March 14, 1899, found all issues in favour of the respondents and a general verdict for them, the question of damages being sent to a referee. They have since been assessed at 8000*l*. This judgment was affirmed on appeal to the Full Court, and on June 26, 1899, an order was made that the appeal be dismissed with costs. The present appeal is from that order.

The learned judges in the Full Court followed the decision of the Court of Mining Appeal on the special case submitted to them, that the cancellation of the leases did not take effect as against Ramsden until notice of the decision of the Governor

was communicated to him, and that was not until February 22, 1896. If so, it followed that Austin's application of February 7, 1896, was premature and of no effect, and Ramsden's application of March 9 was not made until after the expiration of Austin's preferent right of application.

Their Lordships are of the same opinion. They agree that there must be an unequivocal expression of the Governor's will to avoid or cancel the leases which had been found to be voidable. They do not think that merely transmitting his decision to the Warden was such an act. It is true there was no provision in the regulations then in force requiring the Warden to give notice to the parties. But that is immaterial. So long as this decision lay dormant in this office, and no notice was given to the lessee, and the land was not declared vacant by some other overt act of the Governor, it was not an unequivocal or irrevocable expression of the Governor's will.

Their Lordships will therefore humbly advise His Majesty that this appeal be dismissed. The appellant must pay the costs of it.

Solicitors for appellant: *Sutton, Ommanney & Rendall.*
Solicitor for respondents: *Ralph C. Leach.*

A.C. 354; 84 L.T. 371)
Considered. BATTAN SINGH
v. AMIRCHAND .. .. [1948] 1 All E.R. 152

[PRIVY COUNCIL.]

J. C.* 1901 *Feb.* 13; *March* 23.

PERERA AND OTHERS. . . . . APPELLANTS;

AND

PERERA AND ANOTHER . . . . . RESPONDENTS.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Law of Ceylon—Execution of Wills—Ordinance No. 7 of 1840, s. 3—Notary present without Attesting—Testamentary Capacity.

Ceylon Ordinance No. 7 of 1840, s. 3, requires that a testator's signature shall be made or acknowledged in the presence of a licensed notary public and two or more witnesses duly attesting the execution, or, if no notary be present, then in the presence of five or more witnesses duly attesting:—

Held, that the words "if no notary be present" mean present acting in his notarial capacity.

Where a notary was present but refused to act in that capacity by attesting, and the will was in consequence attested by five witnesses, *held*, that it was validly executed.

Where a testator is of sound mind when he gives instructions for a will, but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, *held*, that he must be deemed to be of sound mind when it is executed.

Parker v. *Felgate*, (1883) 8 P. D. 171, approved.

APPEAL from a judgment in review of the Supreme Court (Oct. 7, 1898) setting aside a decree of the same Court (May 20, 1898) and restoring an order of the District Court of Kalatara (Feb. 24, 1898), whereby probate of the will of Abraham Perera was issued to the respondents, who were the executors thereof.

The Supreme Court on May 20, 1898, held that, there being evidence in the case that a duly licensed notary was present at the execution of the will, the subscription of it before witnesses without his attestation was not a due execution of it under s. 3, Ordinance No. 7 of 1840.

In review a majority of the Court reversed this decision, holding that it was not open to the appellants, having regard to the issues framed, to contend that there was no proof of the

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

due observance of legal formalities. On the question of the testator's disposing mind, they found that it was not impossible that the deceased was sufficiently aroused from his state of stupor to understand that the will brought to him for signature was that which he had instructed the notary to prepare at a time when he was of sound disposing mind. They found that the testator believed that the draft so prepared had been drawn up according to his instructions, and also that the draft had in fact been so prepared.

Mayne and *Cassel*, for the appellants, contended that, upon the true construction of s. 3 of Ordinance No. 7 of 1840, a will not notarially attested is only valid if no notary is present. It was proved that at the execution of the will in suit a notary was present, and not merely present but capable of acting in a notarial capacity, and in truth so acting until the question of attestation arose, when he refused to sign. The Ordinance gives an alternative mode of execution. If a notary is present, he must put his name to it as a witness—otherwise the execution is invalid. If none is present, five or more unprofessional witnesses will render the execution valid. But their signatures will not cure his refusal or neglect if he is present to authenticate the instrument. They further contended that it was proved by the medical and other evidence that the deceased was not of a sound disposing mind when he signed the will.

The respondents did not appear.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. This appeal is ex parte. There are two questions in the case, one of law and one of fact: (1.) Was the document propounded as the will of Abraham Perera duly executed according to the law of Ceylon? (2.) Was the alleged testator of sound and disposing mind when he set his hand to that document?

Ordinance No. 7 of 1840, s. 3, enacts that no will shall be valid unless the signature of the testator "shall be made or acknowledged by the testator in the presence of a licensed notary public and two or more witnesses, who shall be present

J. C.
1901
PERERA
v.
PERERA.

at the same time and duly attest such execution, or, if no notary shall be present, then such signature shall be made or acknowledged by the testator in the presence of five or more witnesses present at the same time, and such witnesses shall subscribe the will in the presence of the testator, but no form of attestation shall be necessary."

Perera's will was signed with a cross by the testator in the presence of five witnesses present at the same time, who duly subscribed the will in the presence of the testator. But there were other persons present in the room when the will was signed. Among them was a licensed notary public, one Gooneratne, a near neighbour and intimate friend of the testator, who had prepared the will, but who declined to attest it for fear of displeasing a wealthy client of his, one Simon Fernando. Fernando, it seems, had learnt that the will would contain a devise of some land in Colombo to which he laid claim, and had requested Gooneratne not to attest it, saying that he would "spend hundreds of pounds" in impeaching it. In consequence of his threat the notary went to the testator and explained his position, and advised that the will should be executed as a non-notarial will in the presence of five witnesses. To this the testator consented, on the notary's assurance that a will so executed would be valid.

No objection was taken in the Court of first instance on the ground of Gooneratne's presence; but in the Court of Appeal both the learned judges who heard the appeal, Laurie J. and Browne A.J., held that the will was invalid on that ground.

The case was then brought before the Supreme Court in its collective capacity on review preparatory to an appeal to Her late Majesty. The Supreme Court reversed the judgment under appeal, and then proceeded to determine the case upon the merits. The Court, consisting of Bonser C.J., Withers and Laurie JJ., Laurie J. dissenting, held that the testator was of sound and disposing mind, and restored the order of the primary judge.

Their Lordships entirely agree with the Chief Justice and Withers J. in holding that the words of the Ordinance, "if

no notary shall be present," mean, if no notary shall be present acting in his notarial capacity. Mr. Mayne in his able argument did not contend that the mere bodily presence of a notary would vitiate the execution of a will attested by five witnesses. He admitted that if the notary were drunk or asleep or mentally incapacitated he would not be present within the meaning of the Ordinance. But he contended that in this case the notary was not only present, but acting in a notarial capacity up to the very last moment, when, as he argued, it was too late for him to stand aside or retire from his position. Their Lordships have some difficulty in following this argument. When the view of Laurie J. and Browne A.J., that the merely bodily presence of a notary who does not attest the will vitiates the attestation of the five witnesses required by law, is abandoned, it is difficult to see any sound distinction between the case of a notary who is present but incapable of performing his notarial duties, and the case of a notary who is present and refuses for some reason or other to perform those duties. Nor is it easy to see what difference it makes whether the notary who is present refuses to perform his notarial duties at the last moment, or has refused at some earlier time to act on the occasion in his notarial capacity.

Then comes the question, Was the testator of sound and disposing mind when he signed the instrument now in question?

The alleged will was executed in the early morning of June 5, 1896, between 1 and 2 o'clock A.M. Of the persons present on that occasion no less than five gave evidence at the trial in support of the will. They heard what the testator said. They saw what he did. If their evidence stood alone, there could be no doubt that the testator was then perfectly competent. They were Gooneratne, the notary, Rodrigo, his clerk, and three of the attesting witnesses. The other two attesting witnesses had deposed to the like effect on the application for probate, but they were not called at the trial. There is, however, no suggestion that they were improperly kept back. Three other persons were called in support of the will—William D'Abrew, Dr. Fernando, M.D. of London University, Assistant Colonial

J. C. 1901 PERERA v. PERERA.

Surgeon, and de Silva, a native doctor. The evidence of the native doctor is of little or no value. D'Abrew, who was a broker to an European firm of merchants, apparently a man of property and a great friend of the testator as well as of Simon Fernando, saw the testator on business on June 5. He says that the testator then conversed with him "very freely for about ten minutes," and "talked very sensibly." Dr. Fernando was not called in until June 8. Perera was then in a state of coma, which the doctor was told had set in that morning. However, "after a bit" Dr. Fernando was able to rouse him and obtain answers to a few simple questions. "He answered in a few words," says Dr. Fernando. "He seemed to understand my questions."

In opposition to the will three witnesses were called—the testator's widow, Dr. Fonseka, a young medical practitioner who was in attendance on the testator from May 25 and saw him latterly twice a day, and Dr. Rockwood, general physician of the Colombo Hospital and a gentleman of acknowledged eminence in his profession. The evidence of the widow may be disregarded. She was not believed by the judge at the trial, or by the majority of the Court of Appeal on review. Her story is obviously unworthy of credit. It is inconsistent with her own conduct when the application for probate was made, and it is contradicted on all material points by a body of evidence which it is impossible to reject. Dr. Fonseka and Dr. Rockwood, however, whose evidence is beyond suspicion, give it as their opinion that from and after June 2 Perera was not in a fit condition to execute a will. Dr. Fonseka undoubtedly had ample opportunity of observing the testator's condition during his last illness, but naturally he would be much influenced by Dr. Rockwood's opinion. Dr. Rockwood only saw Perera once, and that was on June 2. He saw him then under great disadvantages. It was the day after Perera had had a long and exhausting interview with Gooneratne, sitting up in his bed for two or three hours and giving minute instructions for the disposition of his property. Perera was also suffering on that day from suppression of urine, which was the immediate cause of Dr. Rockwood being sent for. It

is not by any means improbable that these two circumstances combined may have led Dr. Rockwood to take a more unfavourable view of his patient's condition than the event seems to have justified. Certainly Perera had more vitality left in him than Dr. Rockwood gave him credit for, and at least on two occasions after the will was signed he shewed more intelligence than Dr. Rockwood thought possible from his appearance on June 2.

The question, therefore, comes to this: Having regard to all the circumstances of the case, ought the diagnosis of Dr. Fonseka and Dr. Rockwood, who were not present when the will was executed, to outweigh and prevail over the testimony of eye-witnesses based upon the evidence of their own senses?

Instructions for the will were given on June 1. Perera sent for Gooneratne on that day. Gooneratne went in the evening. Perera told him he wanted to make his will. He called for all his deeds, and, with his deeds before him, gave very full directions for the disposal of his property. The notary was between two and three hours taking his instructions. He took them down in English, as he says his practice was. The will was to be in Sinhalese. On June 2 Gooneratne received a note purporting to come from Perera, though not signed by him, containing some further instructions. Gooneratne took the note to the testator who, told him to adopt it. Then the will was drafted in Sinhalese, and afterwards copied by Gooneratne's clerk for execution.

It is not denied that Perera was in a sufficiently rational state on June 1 to make a will. Dr. Fonseka admits that. Gooneratne, according to the statement of the judge of first instance, was "a very respectable man," and had practised as a notary in English and Sinhalese for twenty years. There does not seem to be the slightest reason for doubting the accuracy of his statement as to the instructions given to him. The only reason suggested by Laurie J. for disbelieving Gooneratne's statement seems to be founded on the elaborate character of the testator's instructions as taken down by Gooneratne. They seem to have been taken down in the form

J. C. 1901 PERERA v. PERERA.

of a will, and not as notes or memoranda. The original instructions and the letter of June 2 were produced at the trial, and the primary judge and the two judges who formed the majority of the Supreme Court on review found nothing suspicious in them. On the materials before this Board their Lordships agree with the opinion of those learned judges. Even if their Lordships had felt any hesitation in accepting their view upon this part of the case, they would not be in a position to differ because either by inadvertence or design the original instructions for the will, as well as the letter of June 2, have been omitted from the record.

The will prepared by Gooneratne from the instructions which were given to him seems to be a fair and just disposition of the testator's property. Moreover, there was no concealment about the preparation of the will. So little secrecy was observed that Simon Fernando, the principal opponent to the will, came to hear of its contents, so far as he was interested in them, on the very day after the instructions were given. One other remark may be made which bears upon the testator's apparent condition. Gooneratne, who saw Perera, frequently during his last illness, does not seem to have thought that there was any immediate necessity for hurrying on the completion of the transaction. The instructions were given on June 1, but it was not until late in the evening of June 4 that the will was brought to the testator for execution.

It is not necessary to go through the evidence of the witnesses who were present at the execution of the will, because it is admitted that if their account of the transaction is to be accepted without qualification there can be no question about the testator's mental capacity.

The will, it seems, was read over to the testator clause by clause by Rodrigo, Gooneratne's clerk. Both Gooneratne and the clerk say that Perera seemed then to be of sound mind. After the will was read over and a clause of attestation had been added, the attesting witnesses were called in and the will was executed. One of the attesting witnesses was a brother of Simon Fernando, and on good terms with him. In consequence of his position he declined to join the other attesting

witnesses in the affidavit for probate. He was, however, called as a witness at the trial, and seems to have given his evidence very fairly. In cross-examination he says he was told that Perera wanted him. He went up to Perera's bedside and asked him why he wanted him. Perera said there was a will of himself and his wife, and he wanted the witness to sign. He said there was something still to write in the will, and he asked the witness to go and sit outside. When the witnesses were called in again the testator was seated at a table near the bed, and he heard the deceased say that he had not signed his name for some time and he felt nervous. The other attesting witnesses gave evidence to the same effect, and they added that the notary explained that it was not necessary for the testator to sign his name, and that it would be sufficient if he put his mark to the will; and so Perera signed every sheet with a cross.

The learned counsel for the appellant did not contend that the witnesses in support of the will were acting in conspiracy or saying what they knew to be false. He said that the will may have been, and probably was, read over to the testator, but that there was nothing to shew that he followed the reading of the will or understood its meaning. He adopted the argument of Laurie J., to the effect that it was not enough to prove that a testator was of sound mind when he gave instructions for his will, and that the instrument drawn in pursuance of those instructions was signed by him as his will, if it is not shewn that he was capable of understanding its provisions at the time of signature. That, however, is not the law. In *Parker* v. *Felgate* (1) Sir James Hannen lays down the law thus: "If a person has given instructions to a solicitor to make a will, and the solicitor prepares it in accordance with those instructions, all that is necessary to make it a good will, if executed by the testator, is that he should be able to think thus far: 'I gave my solicitor instructions to prepare a will making a certain disposition of my property; I have no doubt that he has given effect to my intention, and I accept the document which is put before me as carrying it out.'"

(1) 8 P. D. 171.

J. C. 1901 PERERA v. PERERA.

Their Lordships think that the ruling of Sir James Hannen is good law and good sense. They could not, therefore, hold the will invalid even if they were persuaded that Perera was unable to follow all the provisions of his will when it was read over to him by Gooneratne's clerk. But they desire to add that they see no reason to doubt or qualify the testimony of the witnesses who agreed in saying that the testator was of sound mind when the will was executed.

Their Lordships will, therefore, humbly advise His Majesty that the appeal must be dismissed.

Solicitor for appellants: *J. J. Freeman.*

[PRIVY COUNCIL.]

J. C.* 1900 Dec. 5, 6, 12. 1901 Feb. 8; March 2.

AJUM GOOLAM HOSSEN & CO. . . . PLAINTIFFS;

AND

UNION MARINE INSURANCE COMPANY, LIMITED. . . . . } DEFENDANTS.

HAJEE CASSIM JOOSUB AND ANOTHER . DEFENDANTS;

AND

AJUM GOOLAM HOSSEN & CO. . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF MAURITIUS.

Unseaworthiness—Presumption—Evidence—Cause of Vessel's Loss unascertainable.

Where a vessel capsized and sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe, there is a presumption of unseaworthiness on which a jury may be directed to act in the absence of evidence. Where evidence is given, all the facts must be considered including the unexplained sinking, and unless it establishes unseaworthiness the defence founded on it must fail.

Anderson v. *Morice*, (1874) L. R. 10 C. P. 58, approved.

The defence in this case was overruled, since the real cause of the loss

---

* *Present:* LORD HOBHOUSE, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

was not ascertainable on the evidence, though it appeared to be attributable to mistakes made in managing the vessel after she sailed rather than to her unseaworthiness when she sailed.

TWO APPEALS, consolidated, from a decree of the Supreme Court (Feb. 1, 1899), whereby judgment was entered for the defendants, the Union Marine Insurance Company, in an action brought against them on December 21, 1896, to recover Rs.126,246, the amount of four policies of insurance. The other appellants, Hajee Cassim Joosub and another, had been made parties as defendants in guarantee.

The policies were granted for the insurance of 7059 bags of sugar shipped on board the SS. *Taif* against the perils of the sea at and from Port Louis, Mauritius, to Bombay.

The defendants pleaded that the *Taif* was unseaworthy when she started on her voyage.

The *Taif* was owned by Hajee Cassim Joosub and another, who were made parties on the ground that if unseaworthiness were proved as alleged, they were liable for breach of contract under their bills of lading.

The question decided in the appeal was whether the unseaworthiness in question was proved. The evidence is given in the judgment of their Lordships.

Asquith, K.C., and *J. B. Matthews*, for the appellants in the first case, contended that as matter of law, in an action against an underwriter upon a voyage policy of marine insurance, the onus lies on the defendant to shew that the ship was unseaworthy at the commencement of the voyage insured. It was also contended that no presumption of unseaworthiness arose from the circumstances under which the ship was lost, and that there was misdirection in telling the jury that unseaworthiness when starting ought or could safely be presumed from her loss. Reference was made to *Anderson* v. *Morice* (1); *Pickup* v. *Thames and Mersey Insurance Co.* (2) In the former case it was distinctly laid down that the fact of a ship sinking in smooth water without any apparent cause would only raise

(1) L. R. 10 C. P. 58, 63, 69. (2) (1878) 3 Q. B. D. 594, 597, 599.

J. C.
1901
AJUM GOOLAM HOSSEN & Co. v. UNION MARINE INSURANCE COMPANY.
HAJEE CASSIM JOOSUB v. AJUM GOOLAM HOSSEN & Co.

a presumption of unseaworthiness in the absence of all other evidence as to the condition of the ship. But when other evidence is given, it was held that then the unexplained sinking was only one of the facts to be considered, all of which must be left to the jury, who may find that the ship was unseaworthy at starting, or, on the other hand, that she was lost by a peril insured against, even though the evidence did not shew or raise a reasonable conjecture as to what the peril encountered really was: see *Steel* v. *State Line Steamship Co.* (1), where it was held that there must be a special finding by the jury of the fact of unseaworthiness; and where it was remarked that the question is, taking all the circumstances together, whether the ship was reasonably fit when she sailed to encounter marine perils, and was her loss occasioned by her being unfit. See also *Gilroy* v. *Price & Co.* (2); *Daniels* v. *Harris* (3); *Davidson* v. *Burnand.* (4)

Upon the evidence they contended that the specific charges brought by the defendants of overloading and of an improper state of the vessel as to ballast or stability or unsafe list were disproved. The evidence displaced the above presumption if it existed, and shewed that the vessel was seaworthy when she started. In any event, the defendants had not discharged the onus of shewing the contrary, or that the loss was not occasioned by the perils insured against, including any unskilful management by those in charge.

Asquith, K.C., and *Lauriston Batten*, for the appellants in the second appeal, contended to the same effect, that the plaintiffs were entitled to judgment against the underwriters, and that their appellants were not liable in guarantee.

Joseph Walton, K.C., *Horridge*, and *A. D. Bateson*, for the respondents, contended that the evidence shewed that the vessel was unseaworthy when she started on the voyage insured. It shewed that at the time of her departure she was deficient in stability, and that she sank shortly after sailing. No evidence was given of there having been any peril of the sea encountered by her or likely to have occasioned her loss.

(1) (1877) 3 App. Cas. 72, 80, 82.
(2) [1893] A. C. 56.
(3) (1874) L. R. 10 C. P. 1.
(4) (1868) L. R. 4 C. P. 117.

Under these circumstances the Court below was right in holding that she was unseaworthy, and on the evidence in the reasons given, namely, that when she left the harbour she had an unusual list, and a considerable amount of free water in her after-ballast tank, and was deficient in stability, and sank within nineteen hours of starting for no apparent cause other than her instability. They relied on the case of *The Golden Fleece* (1), referred to in *Dudgeon* v. *Pembroke*. (2) In that case a verdict was entered for the defendants, both on the plea denying seaworthiness and on that denying that the loss was by perils of the seas. The Queen's Bench approved the direction of Lush J., that they must decide whether the leak from which the vessel foundered was attributable to injury and violence from without, or to weakness from within, and that if it was not attributable to perils of the seas, that is, the violent action of the elements from without, or any other casualty involved in perils of the seas, the jury could come to no other conclusion than that it was due to inherent infirmity of the ship itself. All the facts in evidence must be considered; but it was contended that they were wholly insufficient to outweigh the effect of the unexplained sinking which must have resulted from the unseaworthiness of the ship, since there was no other adequate explanation afforded.

Asquith, K.C., replied.

1901
March 2.

The judgment of their Lordships was delivered by

LORD LINDLEY. This is an action on four policies of insurance on cargo shipped on board the SS. *Taif* to be carried from Port Louis in Mauritius to Bombay. The underwriters defend the action on the ground that the ship was unseaworthy when she sailed. The burden of proving that she was so is on them, and the sole question is whether they have established their contention. In the Court below the Chief Justice held that they had not; but his two colleagues, Moncrieff and Oliver Smith JJ., came to a different conclusion. The decision of the Court was, therefore, in favour of the underwriters and

(1) See *Merchants' Trading Co.* v. *Universal Marine Insurance Co.*, (1870) 2 Asp. M. L. R. 431, n.
(2) (1874) L. R. 9 Q. B. 581.

J. C.
1901
AJUM GOOLAM HOSSEN & Co. v. UNION MARINE INSURANCE COMPANY.
HAJEE CASSIM JOOSUB v. AJUM GOOLAM HOSSEN & Co.

against the plaintiffs, and from this decision the plaintiffs have appealed.

The underwriters have the great advantage of the undoubted fact that the vessel capsized and sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe; and there is no doubt that if nothing more were known, they would be entitled to succeed in the action. If nothing more were known, unseaworthiness at the time of sailing would be the natural inference to draw; there would be a presumption of unseaworthiness which a jury ought to be directed to act upon, and which a Court ought to act upon if unassisted by a jury. But if, as in this case, other facts material to the inquiry as to the seaworthiness of the ship are proved, those facts must also be considered; and they must be weighed against the unaccountable loss of the ship so soon after sailing, and unless the balance of the evidence warrants the conclusion that the ship was unseaworthy when she sailed, such unseaworthiness cannot be properly treated as established, and the defence founded upon it must fail. The law on this point was finally settled in *Pickup* v. *Thames and Mersey Marine Insurance Co.* (1), which followed *Anderson* v. *Morice.* (2) In these cases the Court pointed out the danger and error of acting on the presumption in favour of unseaworthiness in case of an early loss of which the assured cannot prove the cause; and the Court pointed out the necessity of bearing in mind that the defence of unseaworthiness must be overruled unless supported by a sufficient weight of evidence in its favour, after duly considering all the evidence bearing on the subject, including, of course, the very weighty evidence with which the underwriters start their case.

In this case an enormous mass of evidence has been given as to the condition of the ship before and when she sailed, and as to the mode in which she was loaded. Much of such evidence is very conflicting, but the following results are clear, and some of them are really not in controversy.

1. The ship herself was a screw steel steamship. She was

(1) 3 Q. B. D. 594. (2) L. R. 10 C. P. 58.

built in 1884 to carry over 2000 tons dead weight. She was altered about four years afterwards, so as to increase her free-board, and this reduced her dead-weight carrying capacity to a little over 1900 tons. She had made several voyages in safety with full cargoes after her alteration. She was classed 100 A1 at Lloyd's, and no one suggests that she was otherwise than tight, staunch, and strong, and, so far as construction and repair were concerned, in every way fitted for her voyage.

2. She had two water-ballast tanks—one in the fore-part of the ship between the bow and the engine-room, the other in the after-part between the engine-room and the stern. Nothing turns on the fore-tank, but much turns on the after-tank. There is great difficulty in ascertaining with accuracy the capacity of the tank, and how much water, if any, was in it when the ship sailed. So far as their Lordships can make out, the tank would hold some eighty tons of water, of which most, if not all, had been pumped out before she sailed. The pumps by which the tank was filled and emptied were in proper working order, and the master could regulate the quantity of water in the tank as and when he thought proper, both before and for long after sailing—indeed, until shortly before she went down.

3. Her mean draught was 20 feet 4½ inches; and, as already stated, her carrying capacity was somewhat over 1900 tons. If her water-ballast tank was empty, or nearly so, she had less than 1800 tons of coal, cargo, water, and stores on board. The amount of water in her after-tank cannot, on the evidence, have exceeded forty tons, and their Lordships think it was much less, and, in fact, nothing worth mentioning.

4. The ship always had a list to port. The cause of it is not known. Its amount appears to have depended on the weight and stowage of her cargo and coals, and on the quantity of water in the ballast tanks. When on a voyage the list would also depend on the force and direction of the wind and waves. The amount of the list when the ship left port on her last voyage is one of the most controverted matters in this case, and is very difficult to ascertain. Some witnesses say it was very heavy and serious, as much as 14 or 15 degrees; others say not

J. C. 1901 AJUM GOOLAM HOSSEN & Co. v. UNION MARINE INSURANCE COMPANY. HAJEE CASSIM JOOSUB v. AJUM GOOLAM HOSSEN & Co.

more than 1 or 2 degrees. Their Lordships have come to the conclusion that when she sailed her list, which was at one time serious, had been greatly reduced, and was not greater than usual, and was a slight ordinary list and not a source of danger.

5. The ship was loaded with nearly 21,000 bags of sugar, weighing about 1607 tons. These bags were stowed in the hold, with the exception of some 300 or 350 bags, which were stowed in the saloon cabins, the lazaret, the dispensary, and the after-peak. The stowage was made by competent persons, and although one or two faults were found with it during the loading, it appears to have been proper and satisfactory. She had carried over 21,000 bags safely on previous voyages.

6. The captain applied in the morning of the day she sailed for authority to sail, but this was refused on the ground that the ship was too deep in the water and had too great a list. These objections were removed by pumping out water from the after-tank, and he then obtained his clearance papers.

7. The ship sailed from Port Louis at about 2 P.M. on September 23, 1896, with a proper crew. A pilot took her out. Her draught then did not exceed 20 feet 4½ inches on an even keel. Her load-line was above water. She had a slight list to port. The pilot remained with her an hour. He attached no importance to the list, and says distinctly that he could see nothing the matter with her, and that she was neither overloaded nor topheavy.

8. There was a fresh breeze and a confused sea, and shortly after the pilot left her the captain ordered the after-tank to be refilled in order to steady the ship, or to trim her more by the stern, it is not clear which. Sails were also set, and were kept set, during the night until 6 A.M. The wind was on the starboard side, and would therefore tend to increase the list to port. The list had not increased when the tank was filled and the sails were set. At 9.30 the captain went to bed, the list not having then increased. At 10.30 he was called because some water had got into the saloon and had wetted some sugar. He gave orders to remove the wet bags, and he then went to bed again.

9. The list at that time was no worse than before. After this the list greatly increased, but it was not reported to him, and nothing was done to diminish it. At 4.10 A.M. he was called up, the ship having then a strong list and shipping water heavily. He ordered her course to be altered, and her after-tank to be pumped out. This was done so far as it was then possible to do it. The list, however, increased; at 5.30 the sails were taken in; at 6 A.M. she was well on her broadside and would not steer, and at 8.45 she fell over and went down. The wells had been sounded periodically, and there was no water and she did not leak.

Such are the facts. There is no proof whatever that the ship was in danger when the captain ordered water to be pumped into the after-tank. There is no evidence to shew that if the great increase of the list which took place after 10.30 P.M. had been reported to the captain it could not then have been remedied. He says he thinks it could. But when he came on deck after 4 A.M. it was too late to right the ship.

The unseaworthiness relied upon by the defendants is stated in their sixth plea to arise from the ship being overloaded, top-heavy, and crank when she started on her voyage. Danger from water in her after-tank is not referred to. It was contended by the defendants' counsel that with such a cargo as the ship had and stowed as it was she was unsafe when she sailed whether her after-tank was empty or full. If empty, she was topheavy and unstable; if full, she was overloaded and too deep in the water. The difficulty in accepting this view is that the direct evidence is very strong to shew that when she left port she was neither overloaded nor topheavy. The port authorities objected to her sailing when she was too deep in the water and had a heavy list; but they allowed her to sail when these defects were cured by pumping out water from her after-tank. This not only lightened the ship and brought her load-line up, but considerably reduced the serious list which she had when the port authorities refused to let her sail. Their Lordships are satisfied that when she sailed she was not too deep in the water. Indeed, overloading in this sense was practically

J. C.
1901
AJUM GOOLAM HOSSEN & Co. v. UNION MARINE INSURANCE COMPANY.
HAJEE CASSIM JOOSUB v. AJUM GOOLAM HOSSEN & Co.

abandoned in the Court below, and was negatived by all the judges.

On the inquiry at Colombo some of the crew said that in their opinion she was overloaded; and opinions were expressed that she must have been topheavy. But there was much evidence the other way, and, weighing the whole evidence as it now stands, their Lordships agree with the Chief Justice in accepting the pilot's evidence that she was neither overloaded nor topheavy when she left port.

The other judges also negative topheaviness; but they think her after-tank was half-full of water, and that this was a source of danger.

Their Lordships are of opinion that the evidence tends more strongly to shew that the loss of the ship was attributable to mistakes made in her management after she sailed, rather than to her unseaworthiness when she sailed. The balance of the evidence is against rather than in favour of her unseaworthiness at that time.

It was strongly contended that the captain filled the after-tank early on the voyage because he knew that the ship was unstable with a full cargo and an empty after-water-tank. It was contended that his desire was to sail if he could with a full cargo and a full tank, and that when prevented from doing this by the port authorities he satisfied them by pumping water out, intending to pump it in again as soon as he got out to sea. But the pumping out of water from the after-tank began on September 22, before any difficulties with the port authorities arose; and, as already stated, there is no proof whatever that it was necessary to fill the after-tank to avoid danger, whether present or prospective. It may have been desirable to do so for other reasons; but to give effect to the theory in question would be to substitute conjecture for proof. On previous voyages with full cargoes the after-tank appears to have been sometimes empty and sometimes full, although the captain's evidence on this head is far from satisfactory.

A great point was made in the Court below—that the ship sailed with a large quantity of water in her after-tank, and that the weight and wash of this water was, or at all events

might, become a source of danger. This contention seems to have made a great impression on Moncrieff J. and Smith J. Indeed, their judgments are mainly based upon it. It took the plaintiffs somewhat by surprise, as it was inconsistent with the defendants' main contention that the tank was empty when the ship sailed, and being empty that she was topheavy. The suggestion that water in the tank made the ship unseaworthy was not seriously pressed before their Lordships. The fact that the quantity of water in the tank cannot now be satisfactorily ascertained even approximately, and the fact that it could be increased or diminished with ease if desired, probably accounts for the practical abandonment of this point by the experienced counsel who conducted the case for the underwriters before their Lordships. They fell back on overloading and topheaviness. Even if water in the tank might be a source of danger, the judgment of Lord Blackburn in *Steel* v. *State Line Steamship Co.* (1) shews that a ship ought not to be treated as unseaworthy by reason of something objectionable, but easily curable by those on board.

The case is no doubt one of difficulty, and no one can be surprised that the underwriters defended the action on the ground of unseaworthiness. But as the evidence came out, they were forced from one theory to another, and they have failed to prove their case.

It is supposed that the cargo must have shifted; but this is a mere supposition, and there is no evidence of any bad stowage or other cause to account for any shifting of the cargo. All is conjecture. The real cause of the loss is unknown, and cannot be ascertained from the evidence adduced in this action. But underwriters take the risk of loss from unascertainable causes; and, after carefully weighing all the evidence and bearing in mind the presumption of unseaworthiness on which the underwriters rely, their Lordships have come to the conclusion that unseaworthiness at the time of sailing is not proved. They agree with the Chief Justice, and feel compelled to differ from his colleagues. The consequence will be that they will humbly advise His Majesty to allow the appeal, and to order judgment

(1) 3 App. Cas. 72.

J. C.
1901
AJUM GOOLAM HOSSEN & CO. v. UNION MARINE INSURANCE COMPANY.
HAJEE CASSIM JOOSUB v. AJUM GOOLAM HOSSEN & CO.

to be entered for the plaintiffs in the action for the sum assured and damages in the nature of interest at 4 per cent. per annum from December 21, 1896, until payment and costs, other than those occasioned by joining the shipowners as interveners. The insurance company must pay the costs of the appeal of the plaintiffs except those occasioned by the intervention of the shipowners.

As regards the shipowners who were added as interveners and who appealed separately, their Lordships consider that the plaintiffs, having joined them for their own convenience, ought to pay their costs of the action and intervention, and that against them the action should be dismissed with costs; and their Lordships will so advise His Majesty. It would be unjust to the underwriters to order them to pay the costs of the shipowners' appeal, and they must bear their own costs of that.

As the appeals have been consolidated, one order will be drawn up on both appeals.

Solicitors for first appellants: *H. C. Barker & Son.*

Solicitors for second appellants: *Waltons, Johnson, Bubb & Whatton.*

Solicitors for respondents: *Field, Roscoe & Co.*

[PRIVY COUNCIL.]

THE SECRETARY OF STATE FOR FOREIGN AFFAIRS . . . . . } APPELLANT;

AND

CHARLESWORTH, PILLING & CO. AND T. D. CHARLESWORTH & CO. . } RESPONDENTS.

J. C.*
1900
Nov. 7, 8, 9.
1901
Feb. 16.

APPEAL AND CROSS-APPEAL CONSOLIDATED.

ON APPEAL FROM HER BRITANNIC MAJESTY'S COURT, ZANZIBAR.

Law of Zanzibar—Lands taken for Public Purposes—Zanzibar Order in Council, 1884—*Indian Land Acquisition Act*, 1894, *s.* 6—*Compensation—Incidents of Land governed by the Local Law—Mahomedan Law of Compensation—Buildings erected by Government on the Plaintiffs' Land without Authority.*

The lands of the plaintiffs in the island of Mombasa, part of the dominions of the Sultan of Zanzibar, were taken for a railway by the British Government under s. 6 of the Indian Land Acquisition Act, 1894, which had been brought into force in Zanzibar by Order in Council.

In a suit for compensation for the value of the lands so taken, and also of the buildings previously erected thereon by the said Government without authority:—

Held, (1.) As regards the lands, the plaintiffs are entitled under the said Act to the market value thereof at the date of service of notice, under s. 6, including such actual speculative advance therein as had already taken place in consequence of the railway scheme; but excluding any future speculative advance from the like cause.

(2.) As regards the buildings, English law applied under the Order in Council of 1884 and the subsequent treaty of 1886. By that law, notwithstanding treaty rights of exterritoriality, the lex loci rei sitæ governs the incidents of land, that is in this case Mahomedan law, of which law a Zanzibar judge has judicial cognizance.

(3.) By Mahomedan law the houses did not become the plaintiffs' property. The plaintiffs are entitled to have them removed, and the value to them of the right to have them removed from lands which have ceased to be their property is the measure of the compensation due.

APPEALS and cross-appeals by special leave from a decree of Her Majesty's Court for Zanzibar, dated November 28, 1898,

* *Present:* THE LORD CHANCELLOR, LORD HOBHOUSE, LORD MACNAGHTEN, LORD SHAND, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

J. C. 1901

SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & Co.

varying in favour of the respondents a decree of the East African Protectorate Court at Mombasa (July 21, 1897).

These decrees purport to assess the compensation payable by the Secretary of State to the respondents for certain lands compulsorily acquired by the Secretary of State on November 2, 1896, under the circumstances stated in their Lordships' judgment, for the construction of a State railway from Mombasa to Uganda. The Indian Land Acquisition Act (I. of 1894) was, under the provisions of s. 8 of the Zanzibar Order in Council of 1884, extended and made applicable to Zanzibar on May 27, 1896, which was after the Government had taken possession of the said lands.

At the hearing of the cases referred by the Collector in consequence of compensation claims, the judges of the Mombasa Court tried the cases on fresh evidence, and decided them on the merits.

He found that the railway engineers had, in the carrying out of their work of construction, ignored all rights of private ownership, had treated the land as being theirs, and had nearly completed the most important of the railway buildings before taking any steps to acquire the land.

He considered that if the English law governed the cases it was undeniable that the buildings erected on the said land by the Government, before any steps were taken to acquire the same, would have become the property of the owner of the land, and would have, if taken from him, to be acquired upon a proper valuation of the same.

He agreed that under the 16th article of the Zanzibar Treaty of 1886 British subjects are to enjoy within the dominions of the Sultan of Zanzibar the rights of extra-territoriality, and that under s. 8 of the Zanzibar Order in Council, when the Indian law did not apply, the law to be applied, so far as circumstances would admit, was to be the common and statute law of England.

But he held that this did not affect disputes as to land, all questions as to which were to be decided by the lex loci rei sitæ, and that therefore the local law must apply.

He laid down that to himself, an English judge, the local

law, which was the Mahomedan law, must be proved by experts, and he referred to the evidence given before him by two of the Sultan's cadis or judges from Zanzibar, and he proceeded as follows: "Their evidence is conclusive that in a case such as the present the landowner cannot claim possession of buildings placed upon his land by a trespasser, but can only call upon the trespasser to remove the buildings and restore the land to its original state. They gave their evidence well and referred to text-books."

He then came to a finding as to the boundaries and values of the plots.

In appeal the Zanzibar Court held that by virtue of the Zanzibar Treaty of 1886, and of the Zanzibar Order in Council of 1884, s. 8, the English rule of law applied, and the owners were entitled to be paid for the buildings which had been erected on their land while the same was their property and were standing thereon when the land was in fact acquired by the Government, and they assessed the value of the said buildings at the actual cost of their erection as shewn in the Government books.

Their main reason for holding that English law applied was that the principle of extra-territoriality established by the Zanzibar Treaty of 1886 introduced that law into Zanzibar. They said: "In the words of the treaty of 1886, subjects of Her Majesty enjoy, as regards their person and property within the dominions of His Highness the Sultan, the rights of exterritoriality. What is the meaning of that word? It seems to us a separation of persons enjoying that right and their property from the country in which they are; that is to say, that British subjects are justiceable by their own laws and their property subject to the law which would govern them in their own country. This Court has always acted on that principle, gifts inter vivos, contracts, torts, wills, and intestacies being thus construed (as in India) of Christians, Mahomedans, Hindus, Parsees, &c. It has never been contended that there is a general restriction as by Mahomedan law on testamentary power, or that the rules of that law govern succession. In connection with this, we regard Arts. XVIII. and XX. as

J. C. 1901

SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & CO.

merely instructions to the Consul that he should act in such a manner in his official capacity when occasion arises.

"Exterritoriality involves confusion and differences, and we think the difficulty suggested to the mind of the learned judge might be removed by the practice of this Court, which regards easements as running with the land—i.e., a British subject buying a house overlooking the private apartments of an Arab would be restrained by injunction from opening up windows overlooking them. The Order in Council, in our opinion, when it says 'the common and statute law of England in force,' cannot mean that Mahomedan law applies: moreover, the principle of 'lex loci rei sitæ' is one of international law, within the pale of which at the time of the Order in Council it is doubtful if Zanzibar had entered."

The Attorney-General (*Sir R. B. Finlay*), *The Solicitor-General* (*Sir E. Carson*), *Mayne*, and *Sutton*, for the appellant, contended that the question of the respondents' claim to compensation in respect of the buildings must be governed by the Mahomedan and not by the English law. Reference was made to art. 16 of the Zanzibar Treaty of 1886, and to ss. 8 and 21 of the Zanzibar Order in Council of 1884. With regard to the article of the treaty, they contended that on its true construction, and having regard to arts. 18 and 20, it does not impair or qualify the rule that questions and rights of parties relating to land must be governed by the lex loci rei sitæ where, as in Zanzibar, there is an existing system of law in force and actually regulating those rights. With regard to rights of exterritoriality such as are claimed for ambassadors and ships, the reason of those rights is solely that of convenience. They are founded on the inconvenience or impossibility of administering law and justice to foreigners under some circumstances in particular places and according to the general law of the country where they are. The doctrine is not to be pushed further than necessity requires. Even if English law applied, the principle of English law is that the local law must be resorted to. Again, under the sections of the Order in Council, the applied Indian Acts are to take effect as if Zanzibar were a

district in the Presidency of Bombay. In that view British Indian law applies, and by British Indian law the Courts must in such a case as this resort to Mahomedan law: see 2 Phillimore's International Law, p. 221. The plaintiffs have no equitable claim. When they bought the land it did not include the railway buildings. They did not pay for those buildings, and they knew when they bought that the Government were erecting, or were about to erect, such buildings. On the evidence the Zanzibar Court was not justified in awarding any larger sum than the Mombasa Court had awarded. The Court was not justified in regarding prospective value; it should limit its consideration to the actual value on November 2, 1896: see *Stebbing* v. *Metropolitan Board of Works* (1), where it was held that the value of land is to be assessed on the principle of compensation to the owner, making good to him the value thereof actual or potential when taken; s. 24, clause 5, of the Indian Act I. of 1894; Balfour Browne's Law of Compensation, Appendix, p. 718; *Penny* v. *Penny*. (2)

Haldane, *Q.C.*, and *Branson*, for the respondents, contended that the Zanzibar Court was right in holding that the English law applied, and that the buildings in question, when erected upon the respondents' land, became the property of the respondents so as to entitle them to be paid for the same as the owners thereof. They relied on the 5th and 16th articles of the treaty of 1886, and on the rights of exterritoriality thereby conferred, and also on s. 23 of the Order in Council of 1884. It is not shewn that Mahomedan law applies; if it did it does not help the appellant. Reference was made to Mosley's Digest, Introduction, pp. 231, 237, and 267, and to the Hedaya, vol. 3, tit. "Usurpation," bk. 37; where it is said that the right of a landowner under Mahomedan law is to the land with the buildings on it on paying for the value. He is entitled to require that the buildings be left on the land: see *Thakoor Chunder Poramanick* v. *Ramdhone Bhattacharjee* (3), where it was laid down as a general rule, Mahomedan and other authorities being cited, that if he who makes the improvement is not a

(1) (1870) L. R. 6 Q. B. 37, 45.
(2) (1867) L. R. 5 Eq. 227, 235.
(3) (1866) 6 Suth. W. R. 228.

J. C. 1901 SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & Co.

mere trespasser, but is in possession under any bonâ fide title or claim of title, he is entitled either to remove the materials, restoring the land to the state in which it was before the improvement was made, or to obtain compensation for the value of the building if it is allowed to remain for the benefit of the owner of the soil—the option of taking to the building or allowing the removal of the materials remaining with the owner of the land in those cases in which the building is not taken down by the builder during the continuance of any estate which he may possess. But the main contention for the respondents is that English law applies, under which the buildings erected by a stranger without authority belong to the owner of the land. To hold that English law means the lex loci, which in its turn means Mahomedan law, and that a treaty which provides for rights of exterritoriality leaves all the incidents of landed tenure as intra-territorial as they were before or without the treaty, is to deprive language of a definite meaning. It has been contended on the other side that nothing is to be taken into account beyond what is permitted on the authority of *Stebbing* v. *Metropolitan Board of Works* (1), from which case the respondents do not differ. But here the railway has been made and the station erected, and trade facilities in the district are largely increased. The actual present market value of the land has increased in consequence and had done so on November 2, 1896. That is a permissible ground for enhancement of compensation, and one of which the respondents are entitled to the full benefit.

Counsel for the appellant were not heard in reply.

1901 *Feb.* 16.

The judgment of their Lordships was delivered by

LORD HOBHOUSE. These appeals relate to the amount of compensation to be paid for land in the island of Mombasa, taken by the Government under statutory powers. The suits were commenced by two claims lodged with the Collector by the firms of Charlesworth Pilling & Co. and T. D. Charlesworth & Co., who were respectively owners of different plots of the land so taken. The Collector, Mr. Craufurd, who was also acting

(1) L. R. 6 Q. B. 37, 45.

on behalf of the Government, made awards which the plaintiffs did not accept, and which, therefore, were referred to the Consular Court of Mombasa. The Vice-Consul, Mr. Cator, awarded larger sums, which the defendant has not disputed. But the plaintiffs were still dissatisfied, and they appealed to the Court for Zanzibar. The Court again enhanced the amount of compensation, with the effect that both parties are dissatisfied and both appeal from the decrees. There are, therefore, four appeals, two original and two cross-appeals, in the two suits. They have all been consolidated, and have been argued as one case falling under the same considerations, with the exception that one important item of claim is peculiar to one plot belonging to Charlesworth, Pilling & Co.

Mombasa is a small island adjacent to the coast of continental Africa, and it forms part of the mainland dominions of the Sultan of Zanzibar. The authorities who have dealt with this case are established and regulated by Her Majesty's Order in Council passed in 1884 and founded on a previous treaty; and by a subsequent treaty with the Sultan of Zanzibar in the year 1886. There have been later transactions between the Sultan and an English company and the Queen, which are referred to in the judgment of the Vice-Consul and in the case lodged by the defendant, the Secretary of State. They confer on the Queen's Government extensive powers of administration during the continuance of existing agreements. But they are expressed not to affect the Sultan's sovereignty, and for the purpose of deciding questions of an international character in these suits, they have not been discussed in the Courts below, and need not now be discussed.

The Order in Council dated October 17, 1884, is founded on the usual form of recital that by treaty, grant, usage, sufferance, and other lawful means, Her Majesty the Queen has power and jurisdiction in relation to Her Majesty's subjects and others within the dominions of His Highness the Sultan of Zanzibar. The passages material for the decision of the present questions will be found in ss. 6, 7, and 8. Sect. 6 shews that the order applies to British subjects in Zanzibar, to British ships in Zanzibar waters, to Zanzibar subjects and foreigners in

J. C. 1901

SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & Co.

specified cases, and to British-protected persons in so far as by treaty or the other means mentioned Her Majesty has jurisdiction in Zanzibar in relation to them.

"Sect. 7. All Her Majesty's jurisdiction exercisable in Zanzibar under the Foreign Jurisdiction Acts for the hearing and determination of criminal and civil matters . . . . shall be exercised under the provisions of this order, so far as this order extends and applies.

"Sect. 8 (*a*) . . . . Subject to the other provisions of this order, and to any treaties for the time being in force relating to Zanzibar, Her Majesty's criminal and civil jurisdiction in Zanzibar shall, so far as circumstances admit, be exercised on the principles of, and in conformity with, the enactments for the time being applicable, as hereinafter mentioned, of the Governor-General of India in Council, and of the Governor of Bombay in Council, ... and so far as such enactments, ... are inapplicable, shall, so far as circumstances admit, be exercised under and in accordance with the common and statute law of England in force at the commencement of this order.

"(*b*) . . . . declares certain Indian enactments not affecting this question to be applicable to Zanzibar.

"(*c*) . . . . Any other existing or future enactments of the Governor-General of India in Council, or of the Governor of Bombay in Council, shall also be applicable to Zanzibar, but shall not come into operation until such times as may in the case of any of such enactments respectively be fixed by the Secretary of State."

The subsequent treaty, concluded in 1886, has the following provisions:—

"Art. V. Subjects of Her Britannic Majesty shall be permitted throughout the dominions of His Highness the Sultan to acquire by gift, purchase, intestate succession, or under will, or in any other legal manner, land, houses, and property of every description whether movable or immovable, to possess the same, and freely to dispose thereof by sale, barter, donation, will, or otherwise."

"Art. XVI. Subjects of Her Britannic Majesty shall, as

regards their person and property, enjoy within the dominions of His Highness the Sultan of Zanzibar the rights of exterritoriality.

"The authorities of His Highness the Sultan have no right to interfere in disputes between subjects of Her Britannic Majesty amongst themselves or between them and members of other Christian nations. Such questions, whether of a civil or criminal nature, shall be decided by the competent consular authorities. The trial and also the punishment of all offences and crimes of which British subjects may be accused within the dominions of His Highness the Sultan, also the hearing and settlement of all civil questions, claims, or disputes in which they are the defendants, is expressly reserved to the British consular authorities and Courts, and removed from the jurisdiction of His Highness the Sultan.

"Should disputes arise between a subject of His Highness the Sultan or other non-Christian power not represented by Consuls at Zanzibar, and a subject of Her Britannic Majesty, in which the British subject is the plaintiff or the complainant, the matter shall be brought before and decided by the highest authority of the Sultan, or some person specially delegated by him for this purpose. The proceedings and final decision in such a case shall not, however, be considered legal unless notice has been given, and an opportunity afforded for the British Consul or his substitute to attend at the hearing and final decision."

"Art. XX. Should a British subject die within the dominions of His Highness the Sultan of Zanzibar, or dying elsewhere leave property therein movable or immovable, the British Consul shall be authorized to collect, realize, and take possession of the estate of the deceased to be disposed of according to law.

"Art. XXI. The houses, dwellings, warehouses, and other premises of British subjects or of persons actually in their regular service shall not be entered or searched under any pretext by the officials of His Highness without the consent of the occupier, unless with the cognizance and assistance of the British Consul or his substitute."

J. C. 1901

SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & CO.

Art. XXIII. provides for the free exercise of religious worship.

In the year 1895 the Government were planning railway communication from some point in Mombasa into the African mainland. In December, 1895, the plaintiffs entered into agreements by which they acquired title to three of the plots of land in question. The fourth plot was purchased in April, 1896. At the close of the year 1895 the engineers of the Government entered on the land and began to erect railway offices on one of the plots known in these proceedings as Said-bin-Rashid. This was done without any lawful authority; and it has given rise to questions of some subtlety on which the Consular Court and the Zanzibar Court have differed in opinion. Their Lordships will first address themselves to these questions.

It was not till May 27, 1896, that the Indian Land Acquisition Act of 1894 was brought into force in Zanzibar, and not till November 2, 1896, that Mr. Craufurd, the Consul-General, issued a notice under s. 6 of that Act declaring that the land would be required for the railway, and inviting claims for compensation. The day of that declaration is the day on which the property is to be valued for purposes of compensation.

The plaintiffs contend that on that day the buildings erected by the Government were theirs, and they claimed before the Collector to be paid for them. They did not in the first instance claim any specific sum for the buildings apart from the land, but in the course of the hearing before the Vice-Consul they put the amount at Rs.1,68,000. They contend that the rights of the parties are governed by English law, according to which the buildings would become attached to the land. The defendant contends that the case is governed by Mahomedan law, and that the landowner is not entitled to the buildings. The Vice-Consul decided that Mahomedan law applied and compelled him to disallow the plaintiffs' claim entirely. The Zanzibar Court decided that English law applied, and they awarded to the plaintiffs Rs.60,140, which was the cost of the buildings to erect. The plaintiffs insist on the

larger sum claimed by them as being the actual value on November 2, 1896.

The first question is whether the dispute is to be governed by the English or the Mahomedan rules applicable to unauthorized buildings on land. The Indian enactments which the Order in Council makes applicable as far as circumstances admit, either directly or by order of the Secretary of State, do not fit this case; and therefore Her Majesty's jurisdiction is to be exercised under and in accordance with the law of England. But the law of England recognises the principle that the incidents of land are governed by the law of its site. Therefore, by the terms of the order, if we look no further, Her Majesty would exercise her Zanzibar jurisdiction on the principle that Zanzibar law, which is Mahomedan law, applies to this case. And so far there is no difference of opinion in the Courts below.

But then the order is made subject to treaties for the time being in force, and Art. XVI. of the treaty of 1886 confers on British subjects the rights of exterritoriality as regards their persons and their property. The whole controversy turns on the meaning of this one word "exterritoriality." The learned counsel who argued this case could not find any decision on the construction of the term in a treaty. Nor do the text-books tell us much more than that the word denotes a fiction by which the house and land occupied by a foreign sovereign or his ambassador was treated in law as a part of his dominions; and that it is a convenient word to denote any group of privileges belonging to that class. Their Lordships refer to Hall on International Law, p. 163; 4th ed. p. 173; Westlake on Private International Law, 3rd ed. p. 226. The same writers warn us that fictions and metaphors must not be pushed too far.

The Court for Zanzibar appears to have pushed the metaphor very far; holding that the term works a complete separation of the British subject and his property from the country in which they are. It seems to have adopted the principle contended for in the Consular Court and negatived by the Vice-Consul, namely, that where there is a question relating to land

J. C. 1901

SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & Co.

between two British subjects, the land must be looked upon as actually a piece of British land for the purpose of applying the law.

Looking at the latter part of Sect. XVI. and the succeeding sections of the treaty which have been quoted above, we find that it actually specifies all the usual benefits accorded by Mahomedan powers to a British subject. If he is accused of crime or is defendant in a civil suit, his case is decided by his own nation's Consul. If he is complainant the Consul may intervene to protect his interests (Art. XVI.). His servants receive similar protection (Art. XVII.). In case of bankruptcy his property is dealt with according to British law (Art. XVIII.). On his death his property is to devolve according to British law and to be administered by the Consul (Art. XX.). His house is not to be entered by the Zanzibar authorities against his consent unless the Consul authorizes it (Art. XXI.). He is to enjoy the free and public exercise of his own form of religion (Art. XXIII.). Their Lordships do not say that the list of specific instances, though very full, is exhaustive of the general term. Other cases of the same kind would doubtless be included if such there are. But it is reasonable to conclude that the things specified shew the nature of the immunities desired by and accorded to the British subject—complete personal protection, assurance of satisfactory judicial tribunals, and such enjoyment of his property for himself and for those who claim under him as British law would afford him for British property. It is going a long way beyond that, and beyond the reason for these immunities, to say that the moment a plot of land is purchased by an Englishman it is stamped with the same character and is attended by the same incidents that would belong to it if it were actually transferred to England and surrounded by other English land; and to say that his neighbours, who may or may not be British subjects, must have their rights and liabilities governed by its fictitious and not by its actual situation. Their Lordships hold that the grant of exterritoriality does not involve any such conclusion, and that the Vice-Consul is right in holding that in this case the local law applies.

The next question is how the local law is to be ascertained. Is it matter of evidence, or should the Consular Court take judicial notice of it? The Vice-Consul held that he was an English judge, that it was to him foreign law and must be proved by evidence, though he says it is an extreme instance of that principle, especially as he is also one of the Sultan's judges administering Mahomedan law. That circumstance, however, should make no difference in the principle, though it enabled the Vice-Consul personally to appreciate the evidence which he took. The Zanzibar Court was not called upon to express any opinion on this point because it held that the English law applies.

The situation is one of some complexity. The root of the jurisdiction is the treaty grant or other matter by which the Queen has power and jurisdiction in Zanzibar. She thereby becomes an authority in the foreign territory of Zanzibar, though exercising her powers quite independently of the will of the Sultan. On that state of things the Foreign Jurisdiction Acts supervene for the purpose of binding all the subjects of the Queen; and they enable her to order in what way her authority in Zanzibar shall be exercised. She orders that it shall be exercised in accordance partly with certain Anglo-Indian laws and partly with English law. The English law again for certain purposes, of which the present purpose is one, incorporates the local law of Zanzibar. But throughout the matter Zanzibar remains foreign territory, and the Queen and her officers are acting as Zanzibar authorities by virtue of the power which she has acquired, and which is within its limits a sovereign power. It results that a judge acting within these limits is a Zanzibar judge, and is bound to take judicial notice of the Zanzibar law, whatever it may be, applicable to the case before him.

The Vice-Consul, acting on his view, took evidence on the Mahomedan law, which he found to be in favour of the defendant's contention. He also stated that such was his own opinion, which his experience as a Mahomedan judge qualified him to form. Their Lordships are now called upon to pronounce for themselves, and to apply, the Mahomedan law

J. C. 1901

SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & Co.

which the plaintiffs' counsel have argued to be in their favour. On this point they do not feel any difficulty. They follow the law laid down in the Hedaya as translated by Hamilton, book 37, p. 539: "If a person usurp land and plant trees in it, or erect a building upon it, he must in that case be directed to remove the trees, and clear the land, and to restore it to the proprietor. If removal . . . . be injurious to the land, the proprietor of the land has the option of paying to the proprietor of the trees or the building a compensation equal to their value, and thus possessing himself of them; because in this case there is an advantage to both and the injury to both is obviated." The passage then goes on to shew that the compensation is the value which the trees or houses bear upon the proprietor being directed to remove them, because their owner is not at liberty to have them on the ground. That is conclusive against the plaintiffs' contention that the buildings had become their property on November 2, 1896.

The plaintiffs' counsel then argued that at all events they had on that day a right to call on the defendant to remove the buildings, and that they were entitled to be paid for their land with all rights attaching to it. It is not easy to see what such a right would be worth to them; but it is sufficient to say that no such claim has been made. Their Lordships must hold that the Vice-Consul was right in wholly disallowing the claim of the plaintiffs in respect of buildings, and that the defendant's appeal on this point must prevail.

There has been great difficulty in ascertaining the value of the land taken. By the Land Acquisition Act, the Court is directed to take into consideration the market value of the land at the date of the publication of the declaration (s. 23), and by s. 24 it is forbidden to take into consideration, "Fifthly, any increase to the value of the land acquired likely to accrue from the use to which it will be put when acquired. Sixthly, any increase to the value of the other land of the person interested likely to accrue from the use to which the land acquired will be put."

The plaintiffs claimed to be paid for the whole area as for building ground at Rs.2 per square yard = Rs.11,132 per acre,

yielding a total of (in round numbers) Rs.700,000. The Collector took the average of a number of purchases effected by private contract between himself and various owners. That amounted to Rs.431 per acre, yielding a total of about Rs.32,000. The Vice-Consul rejected both these principles.

The claims of the plaintiffs he treated as utterly extravagant. There is land available, and in demand for building, in and adjoining to the town of Mombasa, and again adjoining to the harbour of Kilindini; and sea frontage is valuable. The plaintiffs' land is at considerable distances from both these places, and it has no sea frontage. There is no reason to suppose that it has any present value for habitations. The most part of it is jungle, though here and there are some patches of cultivation. Both Courts are agreed that, independently of the railway, its value is very small. The rather crude principle adopted by the Collector has this defect, that it does not distinguish between the various plots of land sold to him, which varied largely in price from Rs.750 an acre, and more, down to Rs.64. Moreover, several of the contracts were made with Arabs, and the Vice-Consul thinks them of little value as evidence of price, because he did not find that the Arabs had taken in the idea that the value of their land, which they could actually obtain by bargaining, had been enhanced by the railway scheme; so that the prices given to them would unduly lower the average. As for Indians, he thinks that they were fully alive to the advantage they had got and were quite capable of insisting upon it.

On this part of the case a most unfortunate element has been imported into the controversy. The Charlesworths have accused the Collector of using coercion and deceit to get contracts shewing a low average price, and the Vice-Consul complains that, being called upon to pronounce on the validity of the award and on the value of the lands, he has been put to try the motives and character of the highly placed official who valued them in the first instance. He considers that the Collector gave great provocation to the Charlesworths by his faults of temper and by his high-handed dealing with the land

J. C.
1901
SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & Co.

before he had acquired any rights over it, but he entirely acquits him of any dishonesty.

Their Lordships regret that the Court for Zanzibar should have thought it necessary to try this personal altercation all over again. In the outset of their judgment they say that there are two principal questions. First, the conduct of Mr. Craufurd, and, secondly, the amount of compensation. Now, it may be that Mr. Craufurd's conduct was directly relevant to the question whether or no his award was valid. Its only relevance to the question of compensation was this—that it might have been found that the average of prices on which he relied was brought about by his own use of improper means. But his award had been adjudged to be invalid. His principle of valuation had been rejected, and his purchases from Arabs—all the cheaper purchases—had been thrown out of consideration by the Vice-Consul. Those decisions were not disputed by the defendant. How, after that, his conduct could have any material effect on the question of compensation it is difficult to understand. As, however, the judgment of the Zanzibar Court has been read and commented on here, though not by the counsel for the plaintiffs, their Lordships think it right to say that nothing has come under their notice which justifies the severity of the Zanzibar Court towards Mr. Craufurd, or which leads them to think that the Vice-Consul's opinion of him is too favourable.

In coming to this conclusion, their Lordships have not omitted to consider the evidence relating to Mr. Craufurd's purchase from Dewji Jamal, and to the non-production of papers in the arbitration, on which the Zanzibar Court have laid so much stress. Mr. Craufurd's proceedings were highly unbusinesslike, and were even calculated to raise suspicion. But their Lordships cannot discover anything approaching to fraud in them, and it is clear that, as regards the Vice-Consul, he was well aware that Dewji received valuable consideration for his land over and above his purchase-money. The amount of consideration was the only point on which this purchase had any reference to the Vice-Consul's valuation. Their Lordships cannot help thinking that the Zanzibar Court attached

far too much importance to the personal recriminations between Mr. Craufurd and the Charlesworths, and that thereby they in great measure lost sight of the real question which they had to decide.

Having rejected the Collector's method, the Vice-Consul had to consider how he should arrive at the value. He could not follow the prices obtained by previous sale of parts of the same estate, because there were none such during the critical period. He had only the prices given by the plaintiffs themselves in December, 1895. He would not follow the course of capitalising rental, because it was unjust to the plaintiffs, rentals for such lands being little more than nominal. So he set himself to inquire at what prices neighbouring properties of similar character had changed hands since the promulgation of the railway scheme, paying careful attention to the nature of the properties sold. The plaintiffs gave evidence of several sales of small building plots in or close to the town of Mombasa at Rs.1 8*a*., or even as high as Rs.1 15*a*. the square yard. But in that locality there was demand for such building plots, and therefore prices ruled high. In the case of one witness, Adamji, whom the Vice-Consul describes as the principal witness for plaintiffs and commends as thoroughly trustworthy, the Vice-Consul has made some arithmetical mistake, the only one traceable to him. He says that Adamji's prices work out at less than half a rupee per square yard, whereas they do work out at more than Rs.1½. But it remains true that of the small plots, thirteen or so in number, which Adamji mentions as having been sold by him within a short time of giving his evidence in May, 1897, every one is near to the town of Mombasa and has a frontage on the main land caravan route to Makupa. The same witness says that there is no demand for the shambas (the plots) behind. Sales of this kind are clearly of little use for ascertaining the value of the plaintiffs' land, the situation of which, as above described, resembles rather that of the shambas behind than the plots which Adamji sold.

The Vice-Consul paid close attention to sales of land resembling that of the plaintiffs. One Indian vendor, Peerbhoy,

J. C. 1901

SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & Co.

took Rs.550 per acre for land adjoining one of the plaintiffs' plots, and of the same character. Another Indian, Laka Kanji, sold land with a valuable sea frontage for Rs.750 per acre. He had bargained with the plaintiffs to sell it to them at prices beginning at about one-third of a rupee per square yard and coming down to one-fifth. The latter price would be about Rs.920 per acre. The plaintiffs either would not or could not buy at that price. Laka Kanji deposed that he was prepared to take less, and he did take less, and expressed himself to be well satisfied with his bargain.

Then there are purchasers of four plots at Kilindini Harbour in more advantageous positions than that of the plaintiffs' lands. Mr. Baughan, managing partner of Smith, McKenzie, & Co., a commercial firm of high standing, purchased a small plot from the Government for Rs.550 per acre. In this case there was no question of the additional statutory 15 per cent. which a seller to the Government might claim to have considered as an element of price in a sale made by private contract in order to avoid an arbitration. That would tend to raise the price above Rs.550. On the other hand, the plot had a good sea frontage, and was in the nature of accommodation land to Mr. Baughan. And he thinks that the price was excessive, and that no other land in Kilindini is worth so much unless attended by exceptional advantages. The same firm, acting for Sir Tharia Topan's executors, sold land to the Government at Rs.550. So did General Mathews, First Minister to the Sultan. So did De Silva, a Portuguese owner, in whose case Mr. Craufurd was charged by the plaintiffs with coercion, and the Zanzibar Court say that every kind of pressure possible seems to have been brought upon him. But the Vice-Consul, before whom the witnesses were examined at great length, holds that whatever pressure there was De Silva knew perfectly well what he was about. Several other cases were examined by the Vice-Consul, who gives his reasons for thinking the prices high or low, or about the average mark. The upshot of his investigation was that he awarded sums which, when the statutory 15 per cent. was added, amounted: for the largest plot of the plaintiffs Charlesworth, Pilling & Co. to

Rs.750 per acre; for their second plot, Rs.550; for their third plot, Rs.300; for the plot of the plaintiffs T. D. Charlesworth & Co., Rs.550. The awards amount in the aggregate to Rs.43,627.

The Court for Zanzibar awarded sums which, again adding the statutory 15 per cent., amount to Rs.2420 per acre throughout, and to an aggregate of Rs.1,76,997. This is in addition to the Rs.60,140 awarded for the buildings on the Said-bin-Rashid plot.

Their Lordships will not here express in detail the minor points on which the Zanzibar Court has differed from the Vice-Consul. It must be remembered that the Vice-Consul had, for such an inquiry as this, more than the usual advantages of a Court of first instance; for, besides examining the witnesses, he knew the locality and visited the spots in dispute. Moreover, their Lordships find that the Vice-Consul explains much more fully than does the Zanzibar Court the mode in which he deduces his values from the evidence; and the values he brings out are not at nearly so great a distance from those which he examines. It is quite true that in all valuations, judicial or other, there must be room for inferences and inclinations of opinion which, being more or less conjectural, are difficult to reduce to exact reasoning or to explain to others. Everyone who has gone through the process is aware of this lack of demonstrative proof in his own mind, and knows that every expert witness called before him has had his own set of conjectures, of more or less weight according to his experience and personal sagacity. In such an inquiry as the present, relating to subjects abounding with uncertainties and on which there is little experience, there is more than ordinary room for such guesswork; and it would be very unfair to require an exact exposition of reasons for the conclusions arrived at. Nevertheless, between the bulk of the evidence referred to by the Zanzibar Court and their valuation at Rs.2420 per acre there is a very wide gap; and how is it to be bridged over? The judgment of the Court leaves the answer to that question very uncertain.

One class of evidence which might serve the purpose is that

J. C.
1901
SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & CO.

of sales of small building plots in or close to Mombasa. To this the Zanzibar Court appeared to attach some importance, but they mention it rather vaguely and do not shew how they apply it. Their Lordships think that the Vice-Consul was quite right in rejecting the sales of town building plots as a guide to the value of land on which, as he shews, there was on November 2, 1896, and indeed up to the time of his judgment in July, 1897, no plot adapted for the building of godowns or bungalows, nor the chance of any. It seems to their Lordships that, so far as the Court have followed this sort of evidence, they have followed a misleading guide.

Another piece of evidence relates only to the plot of T. D. Charlesworth & Co. It was purchased by Charlesworth, Pilling & Co. in April, 1896, for Rs.1300. In October, 1896, they transferred it to T. D. Charlesworth & Co. for Rs.120,450 (7000*l.*), paid for by credit notes of T. D. Charlesworth & Co., and as to 6000*l.* applied to the discharge of a debt due by the former firm to the latter. The Vice-Consul says this was a mere fanciful value invented by the plaintiffs themselves; being either some family arrangement or effected for the purpose of creating a standard of value. He refused to look at it. The Zanzibar Court say that though the price appears excessive it is not to be entirely disregarded, and that it affords some help in the task of fixing the proper price. To what extent they have relied on it they do not say. Their Lordships agree with the Vice-Consul, and think that to the extent to which the Zanzibar Court have relied on this transaction there has been error in their process.

These are the only specific pieces of evidence which tend to bridge over the gap between the prices on which the Vice-Consul relied and the price of Rs.2420 per acre. If that price is to be justified, it must be on some more general considerations. Their Lordships have already, out of justice to Mr. Craufurd, made some remarks on the disproportionate amount of consideration which the Zanzibar Court bestowed on his conduct. It is difficult to discover that his conduct was relevant at all to the question of compensation as it stood upon appeal, except possibly with regard to the single sale to

De Silva; whether it ought to have been taken with the many others with which the Vice-Consul classed it as a fair test of value. The bearing of that is remote, indirect, and on so very small a portion of the case, that whichever way it was decided it could not much influence the result. Yet this inquiry into conduct was the subject of fresh evidence—oral and documentary—none of which related to De Silva, and of half the written judgment. It is difficult to suppose that the Court would have paid so much attention to this matter unless they considered that it must in some way affect their judgment on the question of value. And yet, so far as it did affect their judgment, it must have led to error.

There is another general consideration of great importance. The sections of the Land Acquisition Act have been stated, which provide that land is to be taken at its market value on a given day, and that the Court is not, on the one hand, to give more because the object for which it is taken is likely to increase its value, nor, on the other hand, to give less because the same object is likely to increase the value of the owner's remaining land. That appears to their Lordships to exclude for both parties speculations on the effects which the railway may produce on prices, except to the extent to which it is shewn that such speculations had actually entered into the market price of this sort of land by November 2, 1896.

There are some expressions in the judgment of the Vice-Consul which at first sight look as if he had admitted speculation on the subjects which the Act forbids. Remarks in that sense were made upon them during the argument, though the defendant has accepted the findings of the Vice-Consul and has never sought to disturb them in any way. But on reading the whole judgment together the expressions admit of the construction that the learned judge was doing no more than trying to ascertain how far such speculations had actually affected men's dealings in the market. So read, they are in accord with the whole tenor of his reasoning, which bases his valuation on inferences from ascertained transactions. He points out that a year earlier the value would have been

J. C.
1901
SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & CO.

much less, that the Government had been badly served, and there had been such delay in introducing the Land Acquisition Act and in making the declaration under it that before November 2, 1896, the Government itself had created special values.

The Zanzibar Court treat the matter very differently. After disposing of Mr. Craufurd's purchases and expressing agreement with the learned judge below, that if the Government had come promptly into the field they would have had to pay very little, they continue as follows:—

"The purchases made by Mr. Craufurd, which have been dealt with already not constituting in our opinion such sales as to give us a fair and proper rate, we must rely on other facts, and the evidence produced at the trial in the Court below.

"When we consider the potential or prospective value of the land taken, whether what was or is now mere agricultural land will probably in a few years' time become valuable, we must bear in mind the fact that all this land is in close proximity and contiguous with the terminus of a railway running many hundreds of miles into the heart of the African Continent, for the construction of which 3,000,000*l.* has been voted by the Imperial Government. Although the plaintiffs' view of value in the future may be somewhat sanguine, yet we think the learned judge was also somewhat pessimistic; a railway must increase trade and traffic, and the value of building sites near its most important station, which undoubtedly is Mombasa."

The only "other fact" mentioned besides the evidence of specific purchases on which the Vice-Consul proceeded, and on which their Lordships have already commented, is the sale by one of the plaintiffs to the other at a fictitious price. For after mentioning this and referring to the opinions of two gentlemen who gave evidence, and of another gentleman who was not called, as to the prospects of the Protectorate, they inclined to the opinion that it is in a prosperous condition, "and it is legitimate to infer that the railway has been a most important factor in effecting it." They then add, "On there-

fore the potential values we feel bound to differ from the learned judge, and for that reason to estimate more highly the properties the subject of this appeal."

Their Lordships cannot read this part of the judgment without seeing that the learned judges have admitted into their minds those very considerations which the Act directs them to exclude, namely, speculations on the value likely to be conferred on the land taken for the railway by the construction of the railway itself. To what extent their valuation has been affected thereby does not appear, but it may easily account, even if standing alone, for any amount of increase over a market price which has been inferred from an examination of actual transactions.

Their Lordships conclude that the valuation of the Vice-Consul is more consonant to the evidence, and is based on sounder principles than that of the Zanzibar Court. The plaintiffs have profited largely by advances in the prosperity of the Protectorate which have been caused by the advent of the British Government and by the action it has taken. If the officials had acted promptly the plaintiffs would have got little if anything more than their purchase-money plus the statutory 15 per cent. As it is they have, by the Vice-Consul's valuation, got within twelve months: for one plot twice what they paid for it, for another half as much again, for a third fifteen times as much, and for the fourth six times as much. The very large increase on those prices which the Zanzibar Court has awarded is due either to attending to evidence not properly applicable to the case, or to general considerations which ought not to have been allowed to enter into the mind at all. As regards evidence, they have given misleading importance to sales of small building plots within or close to Mombasa; and they have treated the transfer from one set of plaintiffs to the other as if it had some relation to market value. As regards general considerations, possibly that of the behaviour of the Collector, and certainly the large importance attached to "potential values," have been sources of error.

The Zanzibar Court made one decree on both appeals of the plaintiffs. It should have dismissed both with costs. Their

J. C. 1901 SECRETARY OF STATE FOR FOREIGN AFFAIRS v. CHARLESWORTH, PILLING & Co.

Lordships will humbly advise His Majesty the King to make an order to that effect on the defendant's appeals, and to dismiss the plaintiffs' appeals. The plaintiffs must pay to the defendant the costs of the consolidated appeals.

Solicitor for appellant: *Treasury Solicitor.*
Solicitors for respondents: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

J. C.* 1901 *Feb.* 20, 21.

EAST INDIAN RAILWAY COMPANY . DEFENDANTS;

AND

KALIDAS MUKERJEE . . . . . PLAINTIFF.

ON APPEAL FROM THE HIGH COURT IN BENGAL.

Liability of Railway Companies—Loss of Life from Explosives in a Railway Carriage—Negligence—Onus probandi.

Railway companies are bound to use proper care and skill in carrying their passengers; they are not liable as common carriers of passengers independently of negligence.

Where a passenger was killed in a railway carriage by an explosive illegally introduced into it:—

Held, that the railway company was not liable in damages unless guilty of negligence in permitting the fireworks to be brought into the carriage. As it was not the duty of the company to search every parcel carried by a passenger, the onus was on the plaintiff to shew that the parcels containing the fireworks suggested danger.

Collett v. *London and North Western Ry. Co.*, (1851) 16 Q. B. 984, explained.

APPEAL from a decree of the High Court affirming a decree of O'Kinealy J. in favour of the respondent for Rs.1500.

The respondent sued to recover damages for the loss of his son Atindranath Mukerjee, who died from the effect of burns received on April 27, 1896, in a fire which took place in a railway carriage of the appellants in which he was travelling as a third-class passenger.

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and LORD LINDLEY.

The fire (as was alleged in the plaint and admitted by the appellants) was caused by an explosion between the stations of Secundrabad and Dadri of certain bombs and other fireworks illegally introduced by a fellow-passenger into the compartment in which the deceased was travelling.

There was no evidence that any one, whether servant of the appellants or not, had noticed the fireworks before they exploded, nor any evidence how they had been carried into the train.

By s. 59, sub-ss. 1, 4, of the Indian Railways Act, 1890, it is provided that no person shall take dangerous or offensive goods with him upon a railway without giving notice of their nature; that the servants of a railway may refuse to receive such goods for carriage, and that any railway servant having reason to believe any such goods to be contained in a package may cause the package to be opened for the purpose of ascertaining its contents.

Both Courts below held that the onus was on the appellants of shewing that they took due precautions to prevent the introduction of the explosives into the carriage, and that in the absence of evidence to that effect the respondent was entitled to judgment.

The Chief Justice in particular held that the facts proved established a primâ facie case of want of such care on the part of the appellant company as might reasonably be required of them, and that the appellants had tendered no evidence to shew that, notwithstanding the powers vested in them by s. 59 of Act IX. of 1890, they had taken any care or precaution to prevent passengers who might be suspected of carrying dangerous goods from taking them into a passenger compartment.

Haldane, K.C., *Bray*, K.C., and *Rowlatt*, for the appellants, contended that this view of the onus probandi was wrong, and that judgment should be entered for the appellants. The accident arose from the unlawful act of two persons who brought combustibles into the carriage. There was no evidence that that unlawful act was due to any negligence or breach of

J. C. 1901 EAST INDIAN RAILWAY v. KALIDAS MUKERJEE.

duty by the appellants. There was no defect in their plant or rolling stock either occasioning or facilitating the accident, nor had the appellants any knowledge or means of knowledge of the danger. There was no duty imposed on them of searching every parcel which a passenger might carry into the carriages. They had no reason to believe that these particular parcels consisted of dangerous goods. There was no primâ facie case of negligence made out in the absence of any evidence as to the circumstances to throw upon the appellants the onus of rebutting it and of proving that they had taken all necessary precaution. The evidence is consistent with there having been no negligence at all. It was for the respondent to shew that something had been negligently done or omitted by the appellants which caused or led to the disaster. Even if the facts were consistent with either theory, that of negligence or of no negligence, the plaintiff must still prove his case before he can recover. The authorities cited were: *Coggs* v. *Bernard* (1); *Readhead* v. *Midland Ry. Co.* (2); *Scott* v. *London and St. Catherine Docks Co.* (3); *Welfare* v. *London and Brighton Ry. Co.* (4); *Metropolitan Ry. Co.* v. *Jackson* (5); *Cotton* v. *Wood* (6); *Wakelin* v. *London and South Western Ry. Co.* (7); *Daniel* v. *Metropolitan Ry. Co.* (8)

Asquith, K.C., and *Branson*, for the respondent, contended that the Courts below were right in holding that the accident was attributable to want of such care as the appellants were bound to exercise in the circumstances. A considerable quantity of fireworks had been carried into the carriage, and from the nature of the damage done it appeared that for a time the carriage had become practically a powder magazine, and a totally unfit vehicle for the conveyance of passengers. An accident on such a scale speaks for itself; and in the absence of evidence to the effect that the dangerous nature of the packages was not recognisable, or that nothing happened to raise any reasonable suspicion, the judgment appealed from

(1) (1703) 2 Ld. Raym. 909; 1 Sm. L. C. 167.
(2) (1869) L. R. 4 Q. B. 379.
(3) (1865) 3 H. & C. 596.
(4) (1869) L. R. 4 Q. B. 693.
(5) (1877) 47 L. J. (N.S.) (Ex.) 303.
(6) (1860) 8 C. B. (N.S.) 568.
(7) (1886) 12 App. Cas. 41.
(8) (1871) L. R. 5 H. L. 45.

was right. It was unreasonable to suggest that ordinary precautions could not prevent an accident of this magnitude, and the company was bound to take ordinary precautions to ensure the safety of their passengers. They ought at least to prove that there had been nothing to excite suspicion. The power of explaining the circumstances and of shewing what they did either on the special occasion or as a matter of ordinary routine was in the appellants, and involved the duty of doing so. They allowed these dangerous fireworks to be introduced into the carriage with a fatal result, and the duty was on them to shew that they did so in a manner which rendered them irresponsible for the consequences. The cases cited on the other side, in which it was held that there was no case to go to the jury, were, first, where the company were without the power or means of preventing what had happened, and, second, where the facts were consistent equally with either of two competing hypotheses—negligence or no negligence. *Scott* v. *London and St. Catherine Docks Co.* (1) was an instance of the latter alternative. Here the appellants were primâ facie responsible; they had it in their power to explain what happened; they had designedly abstained from doing so; and it was contended that they could not escape liability because the plaintiff was unable to ascertain and prove the circumstances and conduct which preceded the occurrence.

Haldane, K.C., replied.

The judgment of their Lordships was delivered by

THE LORD CHANCELLOR. In this case the plaintiff, who is entitled to bring the action, sues the defendant company for the death of his son, who was killed by an explosion in a railway carriage. The explosion was caused by the bringing into the carriage of a quantity of fireworks. The carriage was one in which smoking was permitted; and a small charcoal stand was there for the accommodation of the smokers. The two persons responsible for bringing in the combustibles themselves became the victims of the explosion; but the action is brought against the railway company upon the allegation that

(1) 3 H. & C. 596.

J. C. 1901

EAST INDIAN RAILWAY v. KALIDAS MUKERJEE.

they were guilty of negligence in permitting the explosives to be brought into the carriage.

No precise evidence was given as to the course of business at the station at which the two persons in question got in. The fact that the fireworks were brought in was clear. But it is contended that it was the duty of the company to see that dangerous articles, such as fireworks, should not be permitted to be brought into a passenger train. That it would be negligence knowingly to permit such articles to be carried in a passenger carriage is obvious enough, but it is not suggested, so far as the railway company or their servants are concerned, that they were knowingly permitted to be brought in.

The sole question is whether, upon such facts as are here proved, their Lordships can find reasonable evidence of a neglect of duty on the part of the company, in not detecting the nature of the parcel or parcels which it is presumed that one, or both, of the persons who brought the fireworks to the train had with them when they passed the ticket barrier at the station at which they got into the train.

No evidence is given by any one of the appearance, or even the bulk, of the parcel or parcels. No evidence is given by the railway company of any inspection of any passenger's luggage at the station in question. The parcel, whatever it was, was placed under the seat of the carriage; and some expert evidence was given that the extensive explosion which occurred, and in which the two people responsible for carrying the fireworks were themselves killed, might be caused by half a dozen bombs such as are usually used on such an occasion as these fireworks were intended for, namely, a Hindu marriage; and these bombs are described as being about the size of ordinary cricket balls.

There is no evidence, direct or indirect, of the dimensions of the parcel or parcels; and it seems to have been assumed on both sides that the practice of passengers carrying some of their own parcels into the carriages in which they travel prevails in India as in England.

The question then is reduced to this: whether there is any proof that the parcels carried by the two passengers exhibited

such signs of their real nature as ought to have called the attention of the railway servants to them, and thus prevented such dangerous goods being carried. Their Lordships can find none. If one puts into plain words the duty the neglect of which is relied on, it at once discloses the absence of evidence on the part of the plaintiff. The duty is to prevent dangerous goods from being carried. What evidence is there that any servant of the company knew, or had any opportunity of knowing or inquiring, what these parcels contained? It has been already pointed out that there is no evidence of what they looked like, or whether any part of them was so uncovered as to suggest danger to any one.

Their Lordships cannot think that the railway company were under the obligation to disprove what was not proved, i.e., to disprove that these were dangerous looking parcels, when not a shred of evidence has been given that they were dangerous looking. It was not indeed contended, as it could not be, that it was the duty of the company to search every parcel which every passenger carried with him.

One source of error which their Lordships think has been committed in the judgments below is an apparent misunderstanding of what has been decided in the Courts of this country as to the true obligation which exists on the part of a railway company towards its passengers. The learned judge, Ameer Ali, in terms says: "Now it may be regarded as settled law that, in the case of carriers of passengers under statutory powers, there exists an express duty, independently of any implied contract, to carry them safely." Their Lordships observe that in the course of Mr. Asquith's argument yesterday he used the same phrase: that the extent of the obligation of a railway company is to carry safely; in short, that they are common carriers of passengers. That is not the law. It appears to have given rise to the impression that, that being the state of the law, it was for the railway company to prove beyond doubt that they were not responsible for the accident that occurred. As a matter of fact, the argument would be illogical, because if they were carriers of passengers in the sense of being common carriers they would be responsible,

J. C.
1901
EAST INDIAN RAILWAY v. KALIDAS MUKERJEE.

quite independently of any question whether there was negligence or not. It would be enough to shew that the passenger had not been carried safely, which would at once establish liability. The learned judge appears to have been misled by an observation of Lord Campbell in the case that he quotes of *Collett* v. *London and North Western Ry. Co.* (1) That turned upon the duty of the railway company, which was set out in the declaration, to carry a Post Office clerk under certain provisions of railway legislation. It was demurred to upon the ground that there was no contractual relation between the Post Office clerk and the railway company. The judgment upon demurrer is sufficiently explained if one looks at the allegations in the declaration and the judgment upon it. But unfortunately Lord Campbell used a phrase which the learned judge, Ameer Ali, quotes, that the railway company were under an obligation to carry safely, which their Lordships think has been the origin of the error. Lord Campbell says: "I am of opinion that there is no difficulty in the question which has been raised. The allegation that it was the duty of the company to use due and proper care and skill in conveying is admitted"—admitted, that is to say, by the demurrer. "That duty does not arise in respect of any contract between the company and the persons conveyed by them, but is one which the law imposes. If they are bound to carry, they are bound to carry safely." That, probably, is the origin of the error which their Lordships think the learned judges below have fallen into. What Lord Campbell is saying there is that they are not relieved from the ordinary obligations which would exist by contract because by statute they were compelled to carry the Post Office clerk; and he goes on to say that the obligation is not satisfied by carrying a man's corpse and not himself. His mind is not applied at all to the extent of the obligation created, but his mind is upon the argument that there was no obligation at all; and he practically says, "You must take as much care of him as if he was a passenger who contracted with you." Whatever may be the difficulty that arises about such a phrase in Lord Campbell's mouth, there is

(1) 16 Q. B. 984.

no difficulty whatever if one looks at the declaration and the assignment of the breach of duty, where the duty is set up, as, indeed, Lord Campbell, in the earlier parts of his judgment, points out, to carry with reasonable care and diligence; and the allegation in the declaration, corresponding to the duty which exists, is that they did not do so; and then the assignment of breach is not that the man was not carried safely, which according to the argument would be sufficient, but the allegation is that they did not use proper care and skill in the carrying. If one looks at that, as indeed at the two other cases which the learned judge, Ameer Ali, quotes as justifying the onus that he throws upon the railway company, it is intelligible enough. In the one case it was a child under three years of age, between whom and the railway company, of course, there was no contract; and the other is a case of the same character. It is important, perhaps, to observe what runs through the judgments, and to observe that Mr. Asquith, naturally enough, used the same phrase yesterday in his argument as enforcing the necessity of the railway company discharging themselves by any conceivable evidence by saying that their contract was to carry safely. Their Lordships think it is desirable that the error should be plainly stated, because it may mislead others hereafter. It is enough to say that, in their Lordships' judgment, there is no such obligation on the part of the railway company.

Their Lordships will, therefore, humbly advise His Majesty that the judgments appealed from must be reversed, and judgment entered for the defendants in both Courts below; but, having regard to what fell from counsel at their Lordships' bar, without disturbing any directions given in India as to costs.

Solicitors for appellants: *Freshfields.*
Solicitors for respondent: *T. L. Wilson & Co.*

[HOUSE OF LORDS.]

H. L. (E.) 1901 June 24.

FRANCES RAINE . . . . . APPELLANT;

AND

R. JOBSON & CO. . . . . RESPONDENTS.

Employer and Workman—Compensation—Employment on, in, or about a Ship in a Dock—Dock—Factory—Factory and Workshop Act, 1895 (*c.* 37), *s.* 23, *sub-s.* 1—*Workmen's Compensation Act*, 1897 (*c.* 37), *s.* 7, *sub-ss.* 1, 2.

By the combined effect of the Workmen's Compensation Act, 1897, s. 7, sub-ss. 1, 2, and the Factory and Workshop Act, 1895, s. 23, sub-s. 1, every dock is a factory within the meaning of the Compensation Act, and persons who are in the actual use or occupation of a dock (or, *semble*, of a berth in a dock) and employ workmen in cleaning or repairing a ship in the dock are "undertakers" within the meaning of the Compensation Act, and liable to pay compensation to a workman injured in the course of his employment.

Ship repairers took a ship into a dry dock which they had hired for the purpose of cleaning and repairing the ship. One of their workmen engaged in cleaning the ship was sent to the quay, and while crossing the gangway from the ship to the quay fell into the dock and died of the injury:—

Held, reversing the decision of the Court of Appeal, that the dock was a factory, and the ship repairers were occupiers thereof within the meaning of the Workmen's Compensation Act, 1897, and were liable to pay compensation.

Flowers v. *Chambers*, [1899] 2 Q. B. 142, disapproved; *Merrill* v. *Wilson* [1901] 1 K. B. 35, approved.

THE respondents were ship repairers at West Hartlepool, where they had a yard not far from the docks. The yard not being able to receive ships, they were in the habit of engaging a berth in a dock when required. In January, 1900, they engaged a berth (1) in a dock belonging to the North Eastern Railway Company, and took a ship into the dock to be

(1) The only evidence on this point in the notes of the learned county court judge was that given by Mr. Jobson as follows: "We have no dock. We apply to the North Eastern Railway Company for a berth when we are going to repair, and pay dues and get turn in ordinary way. Applied for berth for this ship. We were cleaning the ship. Not loading or unloading. Ship empty. Took ship into dock to inspect bottom. No machinery used." There was no evidence whether the dock contained more than one berth.

inspected and cleaned, and the water was pumped out. The appellant's husband, Raine, was a labourer employed in cleaning the ship, which was empty. Being sent from the ship to the quay to fetch paraffin, Raine stepped on to a sort of gangway connecting the ship with the quay; it tilted up; he fell into the dock and died of the injury. In an arbitration under the Workmen's Compensation Act, 1897, the county court judge, on the authority of *Flowers* v. *Chambers* (1), *Hennessey* v. *McCabe* (2), and *Spencer* v. *Livett* (3), held that the widow could not recover, and gave judgment for the respondents. The Court of Appeal (A. L. Smith M.R. and Vaughan Williams L.J.) affirmed this decision upon the ground that the deceased met with the accident in the course of his employment upon a ship, not upon a dock.

The widow appealed.

By the Workmen's Compensation Act, 1897 (c. 37), s. 7, sub-s. 1, "This Act shall apply only to employment by the undertakers as hereinafter defined, on or in or about a . . . . factory. . . ."

By sub-s. 2, "'Factory' has the same meaning as in the Factory and Workshop Acts, 1878 to 1891, and also includes any dock, wharf, quay, warehouse, machinery, or plant, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, ..."

"'Undertakers' in the case of a . . . . factory . . . . means the occupier thereof within the meaning of the Factory and Workshop Acts, 1878 to 1895. . . ."

By sub-s. 3, "A workman employed in a factory which is a ship-building yard shall not be excluded from this Act by reason only that the accident arose outside the yard in the course of his work upon a vessel in any dock, river, or tidal water near the yard."

By the Factory and Workshop Act, 1895 (c. 37), s. 23, sub-s. 1, various provisions of the Factory Acts with respect to accidents, the powers of inspectors and other sections of the Acts "shall have effect as if (*a*) every dock, wharf, quay, and

(1) [1899] 2 Q. B. 142. (2) [1900] 1 Q. B. 491.
(3) [1900] 1 Q. B. 498.

H. L. (E.) 1901 RAINE v. JOBSON & Co.

warehouse, and, so far as relates to the process of loading and unloading therefrom or thereto, all machinery and plant used in that process . . . . were included in the word factory, ... and the purpose for which the machinery is used were a manufacturing process, and as if the person who by himself, his agents, or workmen temporarily uses any such machinery for the before-mentioned purpose were the occupier of the said premises; and for the purpose of the enforcement of those sections the person having the actual use or occupation of a dock, wharf, quay, or warehouse, or of any premises within the same or forming part thereof, and the person so using any such machinery shall be deemed to be the occupier of a factory."

June 20, 21, 24. *Simey*, and *J. A. Johnston*, for appellant. The appellant is entitled to compensation under the Workmen's Compensation Act, 1897, if the deceased was employed "on, in, or about a factory" within the meaning of s. 7, sub-s. 1. If she is entitled to anything, it is admitted that the amount is to be 150*l*. The ship itself was not a factory, but it was in a dock, and the dock was a factory. First, by s. 7, sub-s. 2, every dock, to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895, is a factory. By s. 23, sub-s. 1, of the Factory and Workshop Act, 1895, certain provisions of the Factory Acts are to have effect as if "every dock, wharf, quay and warehouse were included in the word 'factory'"; and the person having the actual use or occupation of the dock, &c., is to be deemed to be the occupier of a factory. Therefore every dock is a factory within the Workmen's Compensation Act, 1897, s. 7, sub-s. 2, and the occupier of the dock is an "undertaker" within that section. The application of the status of factory to the dock is automatic by the Act itself. This was the view of the Court of Appeal in *McNicholas* v. *Dawson*. (1) But in *Hall* v. *Snowden* (2) they appear to have held the contrary. The two decisions seem inconsistent. In *Flowers* v. *Chambers* (3)

(1) [1899] 1 Q. B. 773, 779. (2) [1899] 2 Q. B. 136.
(3) [1899] 2 Q. B. 142.

the Court of Appeal held that a man employed on board a ship in dock is not employed on, in, or about a dock, even if a dock is a factory. But there the man was on the ship and fell from the upper to the lower deck. Here the deceased was employed outside the ship and in the dock. In *Stuart* v. *Nixon* (1) machinery was used, and it was not necessary to argue the point now in question that every dock is a factory, and that employment on, in, or about a ship in a dock is employment on, in, or about a factory. In *Merrill* v. *Wilson* (2) the Court of Appeal took the view now contended for, and held that shipowners who acted as their own stevedores in unloading their ship in a railway company's dock were undertakers in respect of a factory within the Act of 1897, and liable to make compensation in respect of their workman who was killed in the employment of unloading.

[EARL OF HALSBURY L.C. *Merrill* v. *Wilson* (2) is very like the present case, and is inconsistent with *Flowers* v. *Chambers*. (3)]

There it was held that shipowners having the use of a portion of a quay in a dock were "occupiers of a factory" within the Act. It is not necessary that they should be in occupation of the whole quay or dock. Sect. 23 of the Factory and Workshop Act, 1895, says that the person having the actual use or occupation of any premises "within a dock," &c., "or forming part thereof," shall be deemed to be the occupier of a factory. It matters not therefore whether the respondents had hired the dock or only a berth in the dock. It is to be hoped that this case will finally extinguish the widespread fallacy that workmen employed on, in, or about a ship cannot be within the Act of 1897.

[Secondly, they contended that there being machinery in the dock, though not in use at the time of the accident, the dock was a non-textile factory within s. 93 of the Factory and Workshop Act, 1878, c. 16. The House, as will be seen, gave no decision on this point, and the arguments for and against are omitted.]

(1) [1901] A. C. 79. (2) [1901] 1 K. B. 35.
(3) [1899] 2 Q. B. 142.

H. L. (E.) 1901 RAINE v. JOBSON & Co.

Ruegg, K.C., and *Shortt*, for the respondents. It must be admitted that by the combined effect of the Compensation Act, 1897, and the Factory Act, 1895, every dock is a factory within the Act of 1897. But it does not follow that every person using the dock, or any part of it, is the occupier of a factory within the Act. The respondents were not occupiers of the dock. They had hired a berth in the dock for a temporary purpose only. The words in the Factory Act, 1895, "having the actual use or occupation," mean that there must be exclusive occupation as in rating cases: *Allan* v. *Liverpool.* (1) If this were not so, very wide and serious consequences would follow. Shipowners would be occupiers of a factory every time they took a ship into a dock and for whatever purpose, however unconnected with the dock and dangerous employments. In fact, the contention for the appellant would place shipowners and sailors in the relation to each other which it was manifestly intended to avoid. This was the opinion of the Court of Session in Scotland in *Aberdeen Steam Trawling and Fishing Co.* v. *Peters.* (2) The words used in s. 23 of the Factory Act, 1895, as to the actual use and occupation cannot have the effect contended for. They do not say "any part of the dock," but "any premises within the dock or forming part of the dock."

[EARL OF HALSBURY L.C. What difference can it make whether the respondents hired the dock or a berth in the dock? If they hired the berth they were in the actual use or occupation of premises within the dock or forming part of it.]

Use or occupation means a settled use or occupation, not one for a temporary purpose. The object of the section is to place occupiers under the provisions of the Factory Acts with regard to inspection, register and notice of accidents, rules for dangerous employments and the like. And it is only for the purpose of the enforcement of those provisions that persons are to be deemed to be the occupiers of a factory. It is impossible to suppose that the Legislature intended to apply all those provisions to ship repairers, ship cleaners and shipowners. The Act contemplates one permanent occupier throughout the premises

(1) (1874) L. R. 9 Q. B. 180. (2) (1899) 1 F. 786.

and one only; the other construction creates a number of occupiers constantly shifting. Here the respondents had hired only one berth, and were not in actual use or occupation of the rest of the dock or of the machinery. The respondents were, therefore, not "undertakers" within the Act of 1897.

EARL OF HALSBURY L.C. My Lords, I am of opinion that this judgment ought to be reversed. It appears to me that some difficulty has arisen from the artificial mode in which the Legislature has applied various sections of various Acts as ancillary to the Workmen's Compensation Act. I quite agree that it would appear from that Act of Parliament that it was not within the contemplation of that statute to deal with the relation between shipowners and sailors when engaged in their ordinary occupation of sailing upon the seas or to bring them within that statute at all. But, although I quite agree that that is the true view of what this Act of Parliament has done, it seems to me a most extraordinary consequence of that omission to suppose that thereupon everything that is done in or upon or near a ship is to be excluded from the operation of the Act of Parliament. It would be, to my mind, a most unreasonable and extraordinary extension of that immunity given to persons interested in seafaring adventure to suppose because the accident happened in or upon a ship that therefore it is to be excluded from the operation of the Act of Parliament generally. I know of no such principle; and, therefore, one must examine and see what the facts are that we are dealing with as regards the accident which is the subject-matter of this inquiry.

The respondents are a firm part of whose business consists of repairing ships, and for the purpose of their business they hired a dock. I do not care for what purpose they hired it. For my own part, whether there was a ship in it or not, if they were engaged in some performance for which they required the use of a dry dock, and if in the course of that employment a workman was injured, they would to my mind be clearly within these Acts and liable to pay compensation. The question of fact whether it happened on a ship or not appears to me an absolutely irrelevant inquiry. It is perfectly immaterial whether it was on a ship, or

H. L. (E.) 1901 RAINE v. JOBSON & CO. Earl of Halsbury L.C.

a landing-stage, or a staging, or what not. The respondents were the persons who were at that time the hirers of the dock —a dry dock. A ship was put into the dry dock in order to be cleaned and repaired. It is obvious that for the purpose of cleaning and repairing a ship the external part of that ship must be protected from water, and a dry dock is the appropriate machinery for effecting that object. This man appears to have been an ordinary labourer employed for the purpose of doing anything that was required to be done. In order to fetch something that was intended to be used for the purpose of the work, he was sent from the ship to the land upon a gangway. When he put his foot upon the gangway the gangway slipped, and he was precipitated for a distance of forty-eight feet down and killed. Assuming a dock to be within the statute—and as to that we had a very frank and proper admission that this dock is under the Act a "factory" within the meaning of the Act—here is a man killed by an accident in a "factory," the factory being a dock, and the accident happened in the course of his employment while he was so employed in the dock by the persons who had hired the dock for the purpose of their trade.

My Lords, I am not able at present to follow the train of reasoning by which the respondents sought to suggest that because the wooden structure which was inside the dock and to which the work was being applied was a ship which when floated into the sea would be capable of being treated as a separate entity, and would be free from the operation of the Act generally, that conveys to the dock in which the ship is placed the immunity which the ship itself would possess if sailing upon the high seas. Why that should be so I am wholly unable to understand. The place or the thing that is being used, the dry dock, is not at sea—it forms no part of that subject-matter to which this artificial immunity is given by the statute, but it is an ordinary piece of machinery intended for the purpose of repairing ships, of which machinery these defendants are in occupation I should say, but at all events have the use of it in and about it. Therefore it seems to me that every element required by the statute is satisfied by the

facts which are proved in this case. Therefore, my Lords, I am of opinion that this judgment should be reversed, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

The respondents, Messrs. Jobson & Co., are ship repairers at Hartlepool. They have a place of business there, which in their evidence they call a "manufactory for the repair of ships"; but I do not think it can be described as "a factory which is a ship-building yard," to use the expression which occurs in s. 7, sub-s. 3, of the Act. Having no water frontage, they have no means of launching a vessel, nor have they any place of their own into which they can take a vessel for repair. When employed to repair a vessel which requires to be dry-docked, they hire a dock from the North Eastern Railway Company, who seem to own all the dock accommodation in Hartlepool. That is what was done in the present case. Messrs. Jobson & Co. hired a dry dock, and were cleaning or repairing a vessel in it; a workman employed by them on this job—a labourer, but none the less a workman—met with personal injury by an accident. He slipped off a sort of gangway, fell into the dock, and was killed. Why is that not a case for compensation under the Act? If you translate the account of the accident from ordinary language into the phraseology of the statute, it seems to come under the very words of the enactment. The dock was a "factory," because it was a dock to which some "provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." Messrs. Jobson were "undertakers," because they had at the time the "actual use and occupation" of the dock. The accident happened to a workman in the dock, and it was an accident "arising out of and in the course of" his employment. I agree with Mr. Ruegg that it is difficult, if not impossible, to reconcile the case of *Merrill* v. *Wilson* (1) with *Flowers* v. *Chambers*. (2) Of the two I prefer the later case.

I think the decision under appeal must be reversed.

(1) [1901] 1 K. B. 35. (2) [1899] 2 Q. B. 142.

H. L. (E.) 1901 RAINE v. JOBSON & Co.

LORD SHAND. My Lords, I am of the same opinion.

It cannot be disputed—indeed it has not been disputed—that the dock in question is a "factory" within the meaning of the Workmen's Compensation Act, 1897, s. 7. That statute provides that a "factory" in the Act "has the same meaning as in the Factory and Workshop Acts, 1878 to 1891," and "includes any dock to which any provision of the Factory Acts is applied by the Factory and Workshop Act, 1895." Various provisions of these Factory Acts have been shewn to be applied by the Factory and Workshop Act of 1895, and there is therefore no question that this dry dock is a "factory."

It only remains to ascertain whether the defendants were "undertakers" as defined by s. 7 of the Workmen's Compensation Act. That section provides that the Act shall apply to employment by the "undertakers" on or in or about a factory, and that in the case of a factory the undertaker means "the occupier thereof within the meaning" (again) "of the Factory and Workshop Acts, 1878 to 1895." My Lords, I am not able to perceive any ground upon which I can say that these defendants, the employers of the deceased workman, were not occupiers in the use of that factory. They had taken the dock in order to put the ship into it to execute work on her. The work upon which they were engaged was the cleaning and repairing of the bottom of the ship, and in order to perform this work the use and occupation of the dock for the time was necessary for them. They were thus in terms of the statute "undertakers" within the meaning of the Act, upon whom the responsibility to their servants for injury by accidents was imposed by the statute. The case is entirely different from that of a ship at sea, where the seaman who is injured is incurring only the ordinary maritime risks of men engaged in navigation. It is a case of ship builders or repairers who were in the use and occupation of a dock or factory as defined in the statute, having servants working for them, one of whom sustained an accident with the fatal result described in the evidence. I cannot see any ground upon which it can be held

that the employers and their workmen were not within the purview and terms of the statute.

LORD BRAMPTON. My Lords, I also am of opinion that the decision of the Court of Appeal ought to be reversed; and for the reasons which have been so fully stated by the Lord Chancellor in the judgment he has delivered; but I should like to make one observation of my own with reference to the last point which was so ingeniously and so lengthily argued before us, that it was not the dock but only the berth which was hired. The point was never raised at the trial, and I think it ought not to have been raised here, and our time has been occupied unnecessarily in discussing it.

LORD LINDLEY. My Lords, I shall confine myself to saying that I do not see how to get out of the language of the two sections—s. 7 of the Act of 1897, coupled with s. 23 of the Factory and Workshop Act of 1895. Therefore I agree that the appeal ought to be allowed.

Order of the Court of Appeal and award of the county court judge reversed with costs here and below; cause remitted to the county court of Durham holden at West Hartlepool.

Lords' Journals, June 24, 1901.

Solicitors: *Charles H. Dodd, for J. J. Dodd, West Hartlepool; William Hurd & Son.*

[HOUSE OF LORDS.]

H. L. (E.) 1901 *July* 22.

THE GREAT WESTERN RAILWAY COMPANY . . . . . } APPELLANTS;

AND

THE LONDON AND COUNTY BANKING COMPANY, LIMITED . . . } RESPONDENTS.

Banker — Cheque — Defective Title — Receiving Payment for a Customer— "Customer"—Liability of Banker—Bills of Exchange Act, 1882 (*c.* 61), *ss.* 81, 82.

To make a person a "customer" of a bank within the meaning of s. 82 of the Bills of Exchange Act, 1882, there must be some sort of account, either a current or a deposit account, or some similar relation.

H. having by false pretences obtained from the appellants a cheque crossed "& Co." and marked "not negotiable," took it to the respondent bank. The bank at his request paid part of the amount of the cheque into the account of one of their customers and handed the balance to H. After the respondents had received payment of the cheque from the bank on which it was drawn H.'s fraud was discovered, and the appellants sued the respondents for the amount. It was found as a fact that the respondents received the payment in good faith and without negligence. They had for years been in the habit of cashing cheques for H. in a similar manner. He had no account or pass-book with them :—

Held, that H. was not a "customer" of the respondents, and that they did not receive payment of the cheque for him, within the meaning of s. 82 of the Bills of Exchange Act, 1882, and were not protected by that section; that H. having no title to the cheque the respondents took no title to it or to the money, and were liable to the appellants for the amount of the cheque.

The decisions of Bigham J., [1899] 2 Q. B. 172, and the Court of Appeal, [1900] 2 Q. B. 464, reversed.

HUGGINS, a rate-collector at Newbury, by falsely pretending to the appellants that a rate had been made on them, obtained from them in November, 1898, a cheque drawn by them on the London Joint Stock Bank for 142*l.* 10*s.*, payable to Huggins or order, crossed "& Co." and marked "not negotiable." This cheque Huggins took to the respondents' branch bank at Wantage, indorsed it and handed it to the bank clerk. At Huggins' request 25*l.* was placed to the credit of the Wantage

Rural District Council's account with the bank, and the balance, 117*l.* 10*s.*, was paid to Huggins in cash which he appropriated to his own use. The respondents crossed the cheque to themselves and sent it up to their head office in London, where it was passed through the clearing house and paid. After it was paid Huggins' fraud was discovered, and the appellants sued the respondents for the 142*l.* 10*s.* At the trial before Bigham J. without a jury, Huggins, who had meanwhile been convicted of the misdemeanour, was called as a witness and stated that for twenty years the respondents' branch bank had cashed cheques, some crossed, some not crossed, for him across the counter in a similar manner. None of them were marked "not negotiable." He had never had any account with the bank, nor any pass-book.

Bigham J. found as a fact that the defendants received the payment in good faith and without negligence. He also found that they received it for Huggins and not for themselves, and that Huggins was "a customer" within s. 82 of the Bills of Exchange Act, 1882, and entered judgment for the defendants. (1) This decision was affirmed by the Court of Appeal (A. L. Smith M.R., and Vaughan Williams and Romer L.JJ.). (2)

By the Bills of Exchange Act, 1882 (c. 61), s. 81: "Where a person takes a crossed cheque which bears on it the words 'not negotiable,' he shall not have and shall not be capable of giving a better title to the cheque than that which the person from whom he took it had."

Sect. 82: "Where a banker in good faith and without negligence receives payment for a customer of a cheque crossed generally or specially to himself, and the customer has no title or a defective title thereto, the banker shall not incur any liability to the true owner of the cheque by reason only of having received such payment."

May 2, 3, 6. *H. D. Greene, K.C.* (*Asquith, K.C.*, and *Park Goff* with him), for the appellants. To bring themselves within the protection of s. 82 of the Bills of Exchange Act, 1882,

(1) [1899] 2 Q. B. 172. (2) [1900] 2 Q. B. 464.

H. L. (E.) 1901

GREAT WESTERN RAILWAY v. LONDON AND COUNTY BANKING COMPANY.

c. 61, the respondents must shew that they received payment of the cheque "for a customer." They fail to do this unless they shew that Huggins was a customer and that they received the cheque for him and not for themselves. First, Huggins was not a customer. A person is not a customer unless he has an account at the bank, an ordinary current account; a deposit account would not make him a customer. Huggins had no account of any kind with the respondents. The fact that they had cashed cheques for him before did not make him a customer. This is the result of the authorities: *Mathews* v. *Brown & Co.* (1); *Lacave & Co.* v. *Crédit Lyonnais.* (2) Secondly, the respondents received the cheque for themselves alone. There was no evidence that they collected it for Huggins. It was in fact a purchase of the cheque by the respondents, and as Huggins had obtained the cheque by fraud the respondents could have no better title to it than he had: s. 29, sub-s. 2, and s. 81 of the Bills of Exchange Act, 1882. Huggins' fraud was larceny, and no title at all passed to the respondents.

A. T. Lawrence, K.C., and *Guy Lushington*, for respondents. The appellants cannot complain of Huggins' fraud. It was through the negligence of their station-master in giving a certificate without seeing the rate-book that Huggins was enabled to obtain the cheque. Induced by the appellants' act the respondents parted with their money and took the cheque; they have done nothing wrong; they committed no conversion or tort, did nothing unauthorized with the cheque and are entitled to retain the proceeds: see *Horwood* v. *Smith* (3) and the Sale of Goods Act, 1893 (c. 71), s. 24, sub-s. 2. Huggins' title was voidable, not void, and could not be avoided after a bonâ fide transfer without notice: *White* v. *Garden* (4); *Bentley* v. *Vilmont.* (5) The cheque was obtained by false pretences, a misdemeanour, not by larceny, a felony. If any point was to be made as to larceny it ought to have been made at the trial and the opinion of the judge taken on it. But even if it

(1) (1894) 63 L. J. (Q.B.) 494.
(2) [1891] 1 Q. B. 148.
(3) (1788) 2 T. R. 750.
(4) (1851) 10 C. B. 919.
(5) (1887) 12 App. Cas. 471.

be a felony the respondents are protected by s. 100 of the Larceny Act, 1861, c. 96, having taken the cheque bonâ fide and without notice or reasonable cause to suspect any felony or misdemeanour. The Bills of Exchange Act, 1882, deals only with the title to the cheque; whatever title the respondents had to the cheque they had a good title to the money: *Chambers* v. *Miller*. (1) There is nothing in *Hollins* v. *Fowler* (2) to controvert this. If, therefore, the respondents bought the cheque and collected it for themselves, they can retain the proceeds as bonâ fide holders for value without notice. If they did not collect it for themselves, they collected it for Huggins, and are protected by s. 82 of the Bills of Exchange Act, 1882, for the reasons given by the Court of Appeal. The transactions which had taken place between Huggins and the respondents for twenty years constituted him a customer. The fact that he had no current account is not conclusive against his being a customer. Banking has several branches: a stranger who takes circular notes from a bank to be presented to their agents abroad would be a customer. The word must not be confined to a close technical meaning. Moreover, the Wantage Rural District Council were customers; part of the proceeds of the cheque was paid into their account, and the respondents received and collected the cheque in part on their account, which is enough to bring them within s. 82.

[They also referred to *Pollard* v. *Bank of England* (3); *Clarke* v. *London and County Banking Co.* (4); *Cundy* v. *Lindsay*. (5)]

H. D. Greene, K.C., in reply, was stopped, and the House took time for consideration.

July 22. EARL OF HALSBURY L.C. My Lords, the importance of this case depends upon the true construction of the 1st and 82nd sections of the Bills of Exchange Act, 1882. I think there are more reasons than one for the opinion that I entertain. But the sections to which I refer are of such wide

(1) (1862) 13 C. B. (N.S.) 125.
(2) (1875) L. R. 7 H. L. 757, 763.
(3) (1871) L. R. 6 Q. B. 623, 629, 630.
(4) [1897] 1 Q. B. 552.
(5) (1878) 3 App. Cas. 459.

H. L. (E.) 1901

GREAT WESTERN RAILWAY v. LONDON AND COUNTY BANKING COMPANY.

Earl of Halsbury L.C.

and general importance that I prefer to rest my judgment upon the true construction of those two sections.

I think it is very important that every one should know that people who take a cheque which is upon its face "not negotiable" and treat it as a negotiable security must recognise the fact that if they do so they take the risk of the person for whom they negotiate it having no title to it. In this case it cannot be pretended that Huggins had any title to it at all. I do not understand what additional security is supposed to be given to a cheque by putting the words "not negotiable" upon it, if the fact of its being negotiated can give a title to any one. The supposed distinction between the title to the cheque itself and the title to the money obtained or represented by it seems to me to be absolutely illusory. The language of the statute seems to me to be clear enough. It would be absolutely defeated by holding that a fraudulent holder of the cheque could give a title either to the cheque or to the money. The 82nd section, which contemplates the receipt of such a cheque received in the ordinary course of business for a customer of the bank, seems to me to contemplate a totally different class of transaction from what is disclosed in this case. The bank thought proper to take this cheque as representing its face value, and if Huggins had no title, as he certainly had not, there is nothing in the 82nd section which will entitle them to treat it as receiving payment for a customer.

It is not true to say that the banker is here sought to be made liable by reason of his having received payment for a customer. I do not think that Huggins was a customer of the bank at all within the meaning of the section. But what the bank are really insisting upon here is the valid negotiability of a cheque which was fraudulently obtained, and which it is enacted by the statute shall give no better title than that which the person from whom it was taken himself possessed. The bank insists nevertheless that he had sufficient title to give them to enable them to sue.

As I have said, I do not think Huggins was a customer at all; I do not think the transaction was a banking transaction; and although I think there is another and a distinct ground

which would defeat the bank's claim, I am content to rest my judgment upon the true construction of the statute.

I therefore move your Lordships that the judgment of the Court of Appeal be reversed and that judgment be entered for the appellants with costs.

LORD SHAND. (1) My Lords, I have found the decision of this case to be attended with much difficulty, but have come to be of opinion with your Lordships that the judgments of Bigham J. and the Court of Appeal should be reversed. Having had an opportunity of considering the judgment about to be delivered by my noble and learned friend Lord Lindley, I concur in that judgment and in his Lordship's views of the provisions of the Bills of Exchange Act and in the reasons which his Lordship has given for the reversal of the decision of the Court of Appeal.

LORD DAVEY. My Lords, the first point raised by the learned counsel for the respondents was that Huggins in the circumstances which are stated in the case had a property in the cheque which was indeed voidable by the appellants who had been defrauded, but that the money having been received by the respondents in good faith and without notice of the fraud before the appellants had disaffirmed the transaction, it could not be recovered back from the respondents. *Horwood* v. *Smith* (2) and the Sale of Goods Act, 1893, s. 24, were cited in support of this proposition. My Lords, I am of opinion that Huggins never had any property in the cheque, which was handed to him only as the collector and agent of the overseers in payment of a debt alleged to be due to them. The appellants never intended to vest any property in him for his own benefit, but the property in the cheque was intended to be passed to his employers, the overseers, notwithstanding that it was made payable to Huggins' order. Huggins therefore had no real title to the cheque, and it being marked "not negotiable" the respondents never acquired title to it as against the appellants. I think that this is shewn by the cases of

(1) Read by Lord Davey in Lord Shand's absence.

(2) 2 T. R. 750.

H. L. (E.)
1901
GREAT WESTERN RAILWAY v. LONDON AND COUNTY BANKING COMPANY.
Lord Davey.

Higgons v. *Burton* (1) and *Cundy* v. *Lindsay*. (2) In the former case one Dix, pretending to be agent for one Fitzgibbon, obtained goods from the plaintiff and pledged them to the defendant. It was held that the plaintiff could recover the goods from the defendant before any notice of the fraud or disaffirmance of the transaction. And in *Cundy* v. *Lindsay* (2) the same principle was affirmed in this House.

Bigham J. and the Court of Appeal, however, decided in favour of the respondents on the ground that Huggins was a customer of the respondents, who received the cheque for collection on his behalf within the meaning of s. 82 of the Bills of Exchange Act. The facts upon which they came to that conclusion are that Huggins had for about twenty years been in the habit of cashing cheques received by him as collector of rates at the respondents' bank. His employers, the overseers, kept their account at another bank in Newbury, and it was primâ facie his duty to pay cheques received by him for rates into their banking account. It does not appear whether Huggins cashed cheques at the respondents' bank in any cases except those in which he had to make payments out of the rate collected as poor-rate to the credit of the waywardens or rural district council, who kept their accounts with the respondents. In all the instances which were put in evidence from the books of the respondents the transaction was similar to the one in question, namely, a payment to the credit of a customer of the respondents by means of a large cheque out of which Huggins received the change. He was asked the question in cross-examination whether he ever cashed cheques with the respondents except when he had to make a payment out of the rate to the credit of one of their customers. Unfortunately a discussion arose and the question was never answered. It is not shewn that he did so, and I doubt whether he ever did. But be this as it may, I do not think that the relation of customer and banker was ever established between him and the respondents. It is true that there is no definition of customer in the Act, but it is a well-known expression, and I think that there must be some sort of account, either a deposit

(1) (1857) 26 L. J. (Ex.) 342. (2) 3 App. Cas. 459.

or a current account or some similar relation, to make a man a customer of a banker. On the facts proved in this case I do not think the respondents undertook any duty towards Huggins. They took the cheque he offered in payment of a sum to be placed to the credit of their customers and gave him the change, or in some cases (though it is not proved) they may have bought his cheque possibly for their own convenience in remitting to the head office. But this will not, in my opinion, prove that Huggins was a customer, or that they undertook to collect the cheques on his behalf so as to bring them within the protection of s. 82.

I therefore agree that the appeal should be allowed.

LORD BRAMPTON. My Lords, although I am of opinion that the evidence in this case would have justified the conviction of Huggins for larceny under s. 88 of 24 & 25 Vict. c. 96, still, as the jury by their verdict in fact found him guilty of obtaining the cheque by false pretences, that is, of a misdemeanour and not of a felony, and as throughout the trial of this action the case was so treated, both by the appellants and the respondents, I have thought it right so to treat it in considering the question of the respondents' liability now before your Lordships.

I do not, however, look upon this distinction as at all material, for the question before this House is not whether the respondents, when they received the cheque from Huggins, became the holders in due course in the sense that they were bonâ fide holders for value without notice of the fraud, nor whether they continued to be so until after the cheque was honoured by the appellants' bankers upon whom it was drawn —for nobody impeaches the absolute integrity of the respondents, their officers, and clerks—but whether, in taking this cheque with the words "not negotiable," added to the general crossing "——— & Co." written upon the face of it by the secretary of the appellants before it was sent to Huggins, the respondents' right to receive payment of it was affected by s. 81 of the Bills of Exchange Act, 1882, and was not within the protection of s. 82.

H. L. (E.) 1901 GREAT WESTERN RAILWAY v. LONDON AND COUNTY BANKING COMPANY. Lord Brampton.

The object of s. 81 is obvious. It is to afford to the drawer or the holder (s. 77) of a cheque who is desirous of transmitting it to another person as much protection as can reasonably be afforded to it against dishonesty or accidental miscarriage in the course of its transit, if he will only take the precaution to cross it, with the addition of the words "not negotiable," so as to make it difficult to get such cheque so crossed cashed until it reaches its destination.

To apply that section to the present case, there can be no doubt that a person who obtains from another, by a fraudulently false pretence, a cheque so crossed with the intent to appropriate the proceeds to his own use, as Huggins did, could not make any real title to such cheque; practically it would be the same as if he had stolen it. Having no title himself, he had none to give to anybody else, and if this had been the case of an obliging tradesman cashing the cheque for a friend it would have been unarguable.

But it is said the respondents, being bankers, are protected by s. 82 from liability to pay over to the appellants the moneys they have received by the honouring of the cheque. That the respondents in good faith received payment for the cheque is beyond question. I am not, however, quite so sure that it was altogether without negligence, for I must assume the manager at Wantage knew the meaning and legal effect of the crossing with the words "not negotiable." This point, however, does not appear to have been raised, and certainly there was no finding upon it at the trial. I will reject it, therefore, for present purposes.

The only remaining question is whether the money received by the respondents' bank, when the cheque was honoured, was so received for any customer of the bank. I cannot come to the conclusion that it was, nor do I think the evidence would justify such a finding.

Huggins had no banking account at all anywhere. It is not necessary to say that the keeping of an ordinary banking account is essential to constitute a person a customer of a bank, for if it were shewn that the cheques were habitually lodged with a bank for presentation on behalf of the person

lodging them, and that when honoured the amount was credited and paid out to such person, whether with or without any profit to the bank for so presenting them, I would not say that such transactions might not constitute such person a customer within the meaning of the 82nd section; indeed, I think they would. But as between Huggins and the Wantage branch of the respondents' bank the transactions amounted to nothing of the sort.

It is true that for many years the branch bank manager had been in the habit of accommodating Huggins by cashing cheques made payable to him, some crossed and some not crossed, but none marked "not negotiable." All the cheques were cashed across the counter before presentation. Sometimes a portion of the amount was paid by Huggins' direction in to the credit of the account kept with the bank by the Wantage Rural District Council, but there was never a cheque so changed without Huggins getting some cash out of it, and upon no occasion was a cheque paid in to the credit of the Wantage account above mentioned for presentation on their account; and I can well understand why it was so, because once paid in it could not have been got out without a cheque of the Wantage Rural District Council. I should further observe that the language of the 82nd section is where a banker "receives payment for a customer." In the case before your Lordships, on every occasion of cheques so cashed the money had already been given to Huggins in exchange for the cheque, the money paid to the respondents has been received on their own account to reimburse them, and not on account of Huggins at all.

For these reasons I think the transaction between Huggins and the respondents is not within the protection of the 82nd section, and that as Huggins could give the respondents no better title than he had himself, the appellants are entitled to your Lordships' judgment, and that this appeal should be allowed with costs.

LORD LINDLEY. My Lords, in the view I take of this case it is unnecessary to determine whether Huggins was guilty of

H. L. (E.) 1901

GREAT WESTERN RAILWAY v. LONDON AND COUNTY BANKING COMPANY.

Lord Lindley.

larceny in stealing the cheque, or whether he only obtained it by false pretences, which is the crime of which he was convicted. Whether the cheque was void or only voidable, as contended by Mr. Lawrence, appears to me really immaterial.

Be it void or be it voidable, it was not negotiable, and by s. 81 of the Bills of Exchange Act, 1882, Huggins was not capable of giving a better title to the cheque than he had himself. But it is said that, although the bank had a defective title to the cheque, they have a good title to the money paid to them as holders of it. My Lords, so to construe the section would destroy more than half its utility; a cheque marked "not negotiable" would be no safer than any other cheque if once cashed, i.e., unless payment of it was stopped before it was presented.

I cannot think this is an admissible construction; it has never yet been judicially adopted, and I advise your Lordships to reject it. Every one who takes a cheque marked "not negotiable" takes it at his own risk, and his title to the money got by its means is as defective as his title to the cheque itself. *Fisher* v. *Roberts* (1) is an authority to this effect, and s. 82 seems to me framed on the assumption that this view is correct. That section would not otherwise be wanted.

Upon the other point, it is plain to me that the bank obtained payment of the cheque for themselves and not for Huggins. Whether the bank is to be regarded as having purchased the cheque or as having advanced him its amount on the security of it seems to me immaterial. The bank wanted the money for themselves and not for him. They were entitled to hold the money as against him, and were under no obligation to remit it to him. In no ordinary sense of the expression can the bank be regarded as collecting the money for him, although, no doubt, if the bank could keep the money all liability on his part would be at an end, and in that way he would be benefited by their receipt of the money. Sect. 82 of the Act is a mere reproduction of the previous Act of 1876, and the construction put upon that Act in the case of *Matthiessen* v. *London and County Bank* (2) was, in my opinion,

(1) (1890) 6 Times L. R. 354. (2) (1879) 5 C. P. D. 7.

correct. In *Clarke* v. *London and County Banking Co.* (1) the cheque was paid in for collection, and this was the ratio decidendi.

Further, my Lords, I cannot think that Huggins was in any sense a customer of the bank; no doubt he was known at the bank as a person accustomed to come and get cheques cashed, but he had no account of any sort with the bank. Nothing was put to his debit or credit in any book or paper kept by the bank. The entry in the waste-book, p. 20, is only a memorandum of the transaction. Romer L.J. thought he was a customer because the bank had for years collected money for him; but, in my view, the bank collected money for themselves, not for him, in this particular transaction, and the evidence only shews that previous transactions were similar to this.

The case suggested by Romer L.J. of a customer paying in a non-negotiable cheque to his own credit when his account is overdrawn appears to me very different from that which is before your Lordships for decision.

My Lords, the reasoning of Vaughan Williams L.J. commends itself to my mind, although out of deference to his colleagues he accepted a view which he would not otherwise have entertained. I am clearly of opinion that the judgments appealed from should be reversed, and that judgment should be entered for the plaintiffs with costs, and that they should have the costs of this appeal.

Judgment of Bigham J. and order of the Court of Appeal reversed and judgment entered for the appellants with costs here and below; cause remitted to the King's Bench Division.

Lords' Journals, July 22, 1901.

Solicitors: *R. R. Nelson; Harries, Wilkinson & Raikes.*

(1) [1897] 1 Q. B. 552.

Applied. LONGDON-GRIFFITHS *v.* SMITH. [1950] 2 All E.R. 662.

Applied. LONGDON-GRIFFITHS *v.* SMITH [1951] 1 K. B. 295

[HOUSE OF LORDS.]

H. L. (E.) 1901 *July* 22.

THE TAFF VALE RAILWAY COMPANY APPELLANTS;

AND

THE AMALGAMATED SOCIETY OF RAILWAY SERVANTS . . . . . } RESPONDENTS.

Trade Union—Registered Name—Right to sue or be sued in Registered Name —Trade Union Acts, 1871, *c.* 31, *and* 1876, *c.* 22.

A trade union, registered under the Trade Union Acts, 1871 and 1876, may be sued in its registered name.

The decision of the Court of Appeal, [1901] 1 K. B. 170, reversed and the decision of Farwell J. restored.

A STRIKE having arisen in August, 1900, among the appellants' servants, in which Bell, the general secretary of the respondent society, and Holmes, the organising secretary thereof for the West of England, took part, the appellants brought an action against the respondent society in its registered name, and against Bell and Holmes, claiming an injunction and such further relief as the Court might direct. A summons for an interim injunction having been taken out by the plaintiffs, and a notice of motion having been given by the respondents to strike out the name of the defendant society, Farwell J., sitting as vacation judge, on the 5th September, 1900, dismissed the respondents' application, and granted an interim injunction against the society in terms similar to those of the injunction previously granted against Bell and Holmes, restraining the society, their servants, agents, and others acting by their authority from watching or besetting or causing to be watched or beset the Great Western Railway Station at Cardiff, or the works of the plaintiffs or any of them, or the approaches thereto, or the places of residence, or any place where they might happen to be, of any workman employed or proposing to work for the plaintiffs, for the purpose of persuading or otherwise preventing persons from working for the plaintiffs, or for

any purpose except merely to obtain or communicate information, and from procuring any persons who had or might enter into any contracts with the plaintiffs to commit a breach of such contracts. The following judgment was delivered by

FARWELL J. The defendant society have taken out a summons to strike out their name as defendants, on the ground that they are neither a corporation nor an individual, and cannot be sued in a quasi-corporate or any other capacity. Failing this, they contend that no injunction ought to be granted against them. I reserved judgment last week on these two points, because the first is of very great importance, and counsel were unable to assist me by citing any reported case in which the question had been argued and decided.

Now it is undoubtedly true that a trade union is neither a corporation, nor an individual, nor a partnership between a number of individuals; but this does not by any means conclude the case. A trade union, as defined by s. 16 of the Trade Union Act, 1876, "means any combination, whether temporary or permanent, for regulating the relations between workmen and masters, or between workmen and workmen, or between masters and masters, or for imposing restrictive conditions on the conduct of any trade or business, whether such combination would or would not, if the principal Act had not been passed, have been deemed to have been an unlawful combination by reason of some one or more of its purposes being in restraint of trade." It is an association of men which almost invariably owes its legal validity to the Trade Union Acts, 1871 and 1876. In the present case the foundation of the argument that I have heard on behalf of the society is that it is an illegal association—an argument that would have more weight if the action related to the enforcement of any contract, and were not an action in tort. The questions that I have to consider are what, according to the true construction of the Trade Union Acts, has the Legislature enabled the trade unions to do, and what, if any, liability does a trade union incur for wrongs done to others in the exercise of its authorized powers? The Acts commence by legalising the usual trade

H. L. (E.) 1901 TAFF VALE RAILWAY v. AMALGAMATED SOCIETY OF RAILWAY SERVANT Farwell J.

union contracts, and proceed to establish a registry of trade unions, give to each trade union an exclusive right to the name in which it is registered, authorize it through the medium of trustees to own a limited amount of real estate, and unlimited personal estate "for the use and benefit of such trade union and the members thereof"; provide that it shall have officers and treasurers, and render them liable to account; require that annual returns be made to the registry of the assets and liabilities and receipts and expenditure of the society; provide that it shall have rules and a registered office, imposing a penalty on the trade union for non-compliance; and permit it to amalgamate with other trade unions, and to be wound up. The funds of the society are appropriated to the purposes of the society, and their misappropriation can be restrained by injunction: *Wolfe* v. *Matthews* (1); and on a winding-up, such funds are distributed amongst the members in accordance with the rules of the society: *Strick* v. *Swansea Tinplate Co.* (2) Further, the Act of 1871 contains a schedule of matters which must be provided for by the rules. The object and the limitations of the Acts are stated by Sir George Jessel in *Rigby* v. *Connol* (3) as follows: "That Act, no doubt, was passed primarily with a view to preventing the treasurers and secretaries and officers of these societies from robbing them; that was the chief object. It was discovered that some of these men, abusing the confidence reposed in them, took advantage of the law which made these societies illegal, by appropriating their funds and property to their own use. That, no doubt, was one of the principal objects, and therefore the Act was passed to get at these men. Another object was this: there was a great difficulty in suing and getting their property from third persons, and one object of the Act was to enable these societies to sue in respect of their property, and also to enable them to hold property, such as a house or office, but it was not intended that the contracts entered into by the members of the society should be made legal contracts inter se, so that Courts of justice should interfere to enforce them. If that had been intended, the result would

(1) (1882) 21 Ch. D. 194. (2) (1887) 36 Ch. D. 558.
(3) (1880) 14 Ch. D. 489.

have been this, that an agreement between a number of workmen once entered into, compelling them to work in a particular manner, or to abstain from working in a particular manner, would have been enforceable according to law, and to a certain extent would have reduced some portion of the workmen to a condition of something like serfdom and slavery. Of course the Legislature, by interfering, had no idea of doing anything of that sort." But these limitations merely restrict the actual enforcement of trade union contracts by action or suit, and do not affect the question of the status of the association to which such members belong. Now, although a corporation and an individual or individuals may be the only entity known to the common law who can sue or be sued, it is competent to the Legislature to give to an association of individuals which is neither a corporation nor a partnership nor an individual a capacity for owning property and acting by agents, and such capacity in the absence of express enactment to the contrary involves the necessary correlative of liability to the extent of such property for the acts and defaults of such agents. It is beside the mark to say of such an association that it is unknown to the common law. The Legislature has legalised it, and it must be dealt with by the Courts according to the intention of the Legislature. For instance, a lease in perpetuity is unknown at common law, but such a lease granted by one railway company to another when confirmed by the Legislature becomes valid and binding (see Sir George Jessel's judgment in *Sevenoaks, &c., Ry. Co.* v. *London, Chatham and Dover Ry. Co.* (1)); nor can it be said for this purpose that the association is illegal, for the Legislature by ss. 2 and 3 of the Act of 1871 has rendered legal the usual purposes of a trade union, and has further enabled the trade union to carry into effect those purposes by the provisions to which I have already referred. This is not a case of suing in contract to which the provisions of s. 4 of the Act would apply; it is an action in tort, and the real question is whether on the true construction of the Trade Union Acts the Legislature has legalised an association which can own property and

(1) (1879) 11 Ch. D. 625, 635.

H. L. (E.) 1901

TAFF VALE RAILWAY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS.

Farwell J.

can act by agents by intervening in labour disputes between employers and employed, but which cannot be sued in tort in respect of such acts.

Now, the Legislature in giving a trade union the capacity to own property and the capacity to act by agents has, without incorporating it, given it two of the essential qualities of a corporation—essential, I mean, in respect of liability for tort, for a corporation can only act by its agents, and can only be made to pay by means of its property. The principle on which corporations have been held liable in respect of wrongs committed by its servants or agents in the course of their service and for the benefit of the employer—qui sentit commodum sentire debet et onus—(see *Mersey Docks Trustees* v. *Gibbs* (1)) is as applicable to the case of a trade union as to that of a corporation. If the contention of the defendant society were well founded, the Legislature has authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs that they may do to other persons by the use of that wealth and the employment of those agents. They would be at liberty (I do not at all suggest that the defendant society would so act) to disseminate libels broadcast, or to hire men to reproduce the rattening methods that disgraced Sheffield thirty or forty years ago, and their victims would have nothing to look to for damages but the pockets of the individuals, usually men of small means, who acted as their agents. That this is a consideration that may fairly be taken into account appears from the opinion of the judges given to the House of Lords in the *Mersey Docks Case* (2): "We cannot think that it was the intention of the Legislature to deprive a shipowner who pays dues to a wealthy trading company, such as the St. Catherine's Dock Company for instance, of all recourse against it, and to substitute the personal liability of a harbour-master, no doubt a respectable person in his way, but whose whole means, generally speaking, would not be equal to more than a very small percentage of the damages, when there are any." The proper rule of construction of statutes such as these is that in

(1) (1866) L. R. 1 H. L. 93. (2) L. R. 1 H. L. 120.

the absence of express contrary intention the Legislature intends that the creature of the statute shall have the same duties, and that its funds shall be subject to the same liabilities as the general law would impose on a private individual doing the same thing. It would require very clear and express words of enactment to induce me to hold that the Legislature had in fact legalised the existence of such irresponsible bodies with such wide capacity for evil. Not only is there nothing in the Acts to lead me to such a conclusion, but ss. 15 and 16 of the Act of 1871 imposing penalties on the trade union, and ss. 8 and 15 of the Act of 1876 point to a contrary intention; nor do I see any reason for saying that the society cannot be sued in tort in their registered name. Sects. 8 and 9 of the Act of 1871 expressly provide for actions in respect of property being brought by and against the trustees, and this express intention impliedly excludes such trustees from being sued in tort. If, therefore, I am right in concluding that the society are liable in tort, the action must be against them in their registered name. The acts complained of are the acts of the association. They are acts done by their agents in the course of the management and direction of a strike; the undertaking such management and direction is one of the main objects of the defendant society, and is perfectly lawful; but the society, in undertaking such management and direction, undertook also the responsibility for the manner in which the strike is carried out. The fact that no action could be brought at law or in equity to compel the society to interfere or refrain from interfering in the strike is immaterial; it is not a question of the rights of members of the society, but of the wrong done to persons outside the society. For such wrongs, arising as they do from the wrongful conduct of the agents of the society in the course of managing a strike which is a lawful object of the society, the defendant society is, in my opinion, liable.

I have come to this conclusion on principle, and on the construction of the Acts, and there is nothing to the contrary in any of the cases cited by the defendants' counsel. They were all cases relating to the limitation of the right of enforcing

H. L. (E.) 1901

TAFF VALE RAILWAY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS.

Farwell J.

contracts to which I have already referred. It is true that in *Lyons* v. *Wilkins* (1) the name of the trade union was struck out as a defendant by Byrne J.; but I have been supplied with a copy of the shorthand notes of this case, and I find that the point was not argued, the plaintiffs' counsel not thinking it worth while to contest it; and, on the other hand, although the Court of Appeal in *Trollope* v. *London Building Trades Federation* (2) affirmed an injunction restraining libel by a trade union, I find that the trade union entered no appearance, and that the injunction went against them before Kekewich J. in default of appearance, and his order was affirmed, nothing being said about the society. The cases having the nearest analogy to the present are those like *Ruck* v. *Williams* (3) and *Whitehouse* v. *Fellowes* (4), where unincorporated improvement commissioners and the trustees of a turnpike-road respectively, sued under their respective Acts in the name of their clerk, were held liable in tort. I accordingly dismiss the society's summons with costs.

I have now to consider the question whether an injunction should be granted against the society in addition to that granted last week against Messrs. Bell and Holmes, and I am of opinion that it should. The objects of the society comprise promoting the settlement of disputes between masters and men by arbitration, or, failing that, by other lawful means, and of course a strike is perfectly lawful: the general management of the society is vested in an executive committee, with power to represent the members in disputes about hours and wages; a protection fund is set apart out of the funds of the society for the more effectual protection of the labour and rights of members and for the better carrying on of any movement having that end in view, and in pursuance of its objects and powers. The society by their letter of August 20, signed by the defendant Bell, informed the plaintiffs that they had decided to support the men in their action, and had instructed Bell to take charge of the movement with a view of bringing it to a conclusion, and that all further negotiations were to be

(1) [1899] 1 Ch. 255.
(2) (1895) 72 L. T. 342.
(3) (1858) 3 H. & N. 308.
(4) (1861) 10 C. B. (N.S.) 765.

dealt with through him. The defendant Bell was the general secretary and the defendant Holmes was the local organising secretary of the society; they, as agents for the society, and on their instructions and for their benefit, put themselves in charge of the strike, and on the evidence that was read last week illegally watched and beset men to prevent them from working for the company, and illegally ordered men to break their contracts. I have already held that the society are liable for the acts of their agents to the same extent that they would be if they were a corporation, and it is abundantly clear that a corporation under the circumstances of this case would be liable. See, for example, *Ranger* v. *Great Western Ry. Co.* (1), where Lord Cranworth points out that, although a corporation cannot in strictness be guilty of fraud, there can be no doubt that if its agents act fraudulently, so that if they had been acting for private employers the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation. It is not a question of acting ultra vires, as in *Chapleo* v. *Brunswick Permanent Building Society* (2), but of improper acts in the carrying out of the lawful purposes of the society. In such cases the principal, whether an individual or a corporation, or a body like turnpike trustees, is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved. Granted that the principal has not authorized the particular act, but he has put the agent in his place to do that class of acts, and he is answerable for the manner in which the agent has conducted himself in doing the business with which the principal has entrusted him: see *Barwick* v. *English Joint Stock Bank* in the Exchequer Chamber. (3) Therefore, if it is any longer necessary to grant an injunction, I grant an injunction against the defendant society in the same form as that granted last week against the other defendants.

(1) (1854) 5 H. L. C. 86. (2) (1881) 6 Q. B. D. 696.
(3) (1867) L. R. 2 Ex. 259.

H. L. (E.) 1901 TAFF VALE RAILWAY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS.

These two orders of Farwell J. were set aside by the Court of Appeal (A. L. Smith M.R., Collins and Stirling L.JJ.), who held that a trade union society cannot be sued in its registered name. (1) The railway company appealed.

July 12, 15, 16. *Sir E. Clarke, K.C.*, and *Swinfen Eady, K.C.* (*Francis Williams* and *H. H. Gregory* with them), for the appellants. A trade union, though not a corporation, is a legal entity, capable of suing and being sued in its own name. It is impossible to suppose that the Legislature, having given protection and powers to trade unions by the Acts of 1871 and 1876, did not intend to make them subject to correlative liabilities. Farwell J. has pointed out in his judgment the provisions which treat the union as a legal entity with a registered name; it is liable to penalties as well as its officers, capable of holding property as its own, and invested with the character of a party to appeals and proceedings: Act of 1871, s. 20. It must have an office or incur a penalty; and there must be officers liable to account to the society: ss. 15, 16. To the extent of the whole of its funds such an association ought to be liable for the acts of its authorized agents, and there is nothing in the Acts to exempt it. If, however, the technical view of the Court of Appeal is right, persons injured by the acts of the society's agents must be able to get redress in some way, and an action could be brought against the representatives of the society. This is a principle well established by a series of cases: see *Duke of Bedford* v. *Ellis* (2) and the cases there referred to. The writ might, if necessary, be amended by adding proper representatives as defendants. It is impossible to make every one of the 65,000 members a defendant.

Haldane, K.C., and *S. T. Evans, K.C.* (*T. B. Napier* and *Clement Edwards* with them), for the respondents. For the purpose of this appeal only it is not disputed that if the respondents can be sued in their registered name the injunction might issue, but this is without prejudice to the right, if necessary, hereafter to contend that the society is not liable. The

(1) [1901] 1 K. B. 170. (2) Ante, p. 1.

question now is only whether a trade union can be sued in its registered name. It is not legitimate to invoke the aid of the debates in Parliament when the Acts were being passed in order to construe them, but light is thrown upon the construction by a knowledge of the history of trade unions prior to legislation, and especially by a study of the Reports of the Royal Commission of 1869. The Act of 1871 was inspired by and founded on the Minority Report, which was signed by Lord Lichfield, Mr. Thomas Hughes, Q.C., and Mr. Frederic Harrison, and it is clear that the intention of that report was to avoid incorporation and the attendant liabilities: Webb's History of Trade Unionism. The main controversy was whether there should be incorporation, and the view against it prevailed. The Act of 1871 follows the Companies Act of 1862 (c. 89), s. 6, up to a certain point and stops short of incorporation. Trade unions are allowed to hold property, but not in their own name, only in the name of trustees. And actions in respect of the property may be brought or defended in the name of the trustees. If the Act intended to enable the union to sue and be sued in its registered name, why should trustees be allowed to sue or be sued? Penalties may be recovered, but nothing is said about suing the trade union in its registered name. When the Legislature intends to incorporate it says so, as in the Building Societies Act, 1874 (c. 42), s. 9, and the Industrial Provident Societies Act, 1893 (c. 39), s. 21. (1) The statutory position of trades unions does not resemble that of such societies in this respect, but rather that of the conciliation boards established by the Conciliation Act, 1896 (c. 30). A trade union, then, is not a corporation, nor an individual, nor a partnership. It is like a club, not a legal entity: and there are good reasons for this view. If the society can be sued as such the funds intended for the benefit of widows and orphans can be reached and perhaps exhausted in consequence of improper and illegal acts of the society's officers. That would be a great calamity, and was surely not intended by the Legislature. The primary object of the Act was to get rid of the difficulty in respect of

(1) See judgment of Court of Appeal, [1901] 1 K. B. 174.

H. L. (E.) 1901

TAFF VALE RAILWAY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS.

contracts in restraint of trade and to legalise and strengthen societies which were illegal and were unable to enforce salutary control over their officers and the administration of their funds. No one till now has seriously contended that these societies could be sued as such : the point has never been argued (see the judgment of Farwell J.), although the Act of 1871 has existed for thirty years. There is no more hardship upon plaintiffs in being obliged to sue only the tortfeasors individually in this class of cases than in any other class.

In case the appellants are wrong on the main point they seek to amend by suing representatives, but this is not a case for such a procedure : *Temperton* v. *Russell* (1), which is still law though the judgment contains an obiter dictum which was impugned in *Duke of Bedford* v. *Ellis*. (2)

[They also referred to *In re Amos* (3) and the cases there cited by North J.]

Sir E. Clarke, K.C., in reply.

The House took time for consideration.

July 22. EARL OF HALSBURY L.C. My Lords, in this case I am content to adopt the judgment of Farwell J., with which I entirely concur ; and I cannot find any satisfactory answer to that judgment in the judgment of the Court of Appeal which overruled it. If the Legislature has created a thing which can own property, which can employ servants, and which can inflict injury, it must be taken, I think, to have impliedly given the power to make it suable in a Court of Law for injuries purposely done by its authority and procurement.

I move your Lordships that the judgment of the Court of Appeal be reversed and that of Farwell J. restored.

LORD MACNAGHTEN. My Lords, I am of the same opinion.

Although I should be well content to adopt the judgment of Farwell J. and the reasons he has given, I will venture to add a few words of my own, partly out of respect for the Master of the Rolls, from whose opinion I never dissent without the

(1) [1893] 1 Q. B. 435. (2) Ante, p. 1.
(3) [1891] 3 Ch. 159.

greatest hesitation, and partly in deference to the argument of counsel, which, before your Lordships, has ranged over a wider field, and on the part of the respondents has, I think, assumed a somewhat bolder tone than in the Court below.

The case divides itself into two questions. One may be described as a question of substance; the other is rather a question of form.

Parliament has legalised trade unions, whether registered or not; if registered, they enjoy certain advantages. The respondent society is a registered trade union. Subject to such control as an annual general meeting can exercise, the government of the society is in the hands of its executive committee, a small body with vast powers, including an unlimited power of disposition over the funds of the union, except so far as it may be interfered with by the annual general meeting, or restricted by the operation of the society's rules, of which, in case of doubt, the executive committee is the sole authorized interpreter. Mr. Haldane pointed out, what is true enough, that the funds of the society were contributed for benefit purposes as well as for trade purposes, and warned your Lordships that, if those funds were made answerable for the consequences of such acts as are complained of in the present case, the widow and the orphan might suffer. At first sight that seems a strong point, but the truth is that all the moneys of the society, for whatever purpose they may be collected, form a common fund. That, I believe, is the case with most, if not all, trade unions. If you take up the Report of the Royal Commission on Trade Unions, and turn to the statement accompanying the Minority Report to which Mr. Haldane referred, you will see that there was nothing on which the advocates of trade unions insisted more strongly than on the right of unions to employ the whole of their funds if they chose for the purposes of strikes and in connection therewith. "At present," say the authors of that statement, "the strength of the union, and the confidence of its members, simply consists in this, that it can, if so disposed, employ the whole of its funds in the support of the trade ends." (1) An enforced separation of the funds of the

(1) Eleventh and Final Report, 1869, Dissent (III.), Statement, p. lxi.

H. L. (E.) 1901

TAFF VALE RAILWAY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS.

Lord Macnaghten.

union would be, they say, "arbitrary interference with the liberty of association"—it would "paralyze the efficiency of the institution." The suggestion of such a proposal was "tantamount to a proposal to suppress unionism by statute."

The substantial question, therefore, as Farwell J. put it, is this: Has the Legislature authorized the creation of numerous bodies of men capable of owning great wealth and of acting by agents with absolutely no responsibility for the wrongs they may do to other persons by the use of that wealth and the employment of those agents? In my opinion, Parliament has done nothing of the kind. I cannot find anything in the Acts of 1871 and 1876, or either of them, from beginning to end, to warrant or suggest such a notion. It is perhaps satisfactory to find that nothing of the sort was contemplated by the minority of the members of the Royal Commission on Trade Unions, whose views found acceptance with the Legislature. In paragraph 4 of their report they say: "It should be specially provided that except so far as combinations are thereby exempted from criminal prosecution nothing should affect . . . . the liability of every person to be sued at law or in equity in respect of any damage which may have been occasioned to any other person through the act or default of the person so sued." (1) Now, if the liability of every person in this respect was to be preserved, it would seem to follow that it was intended by the strongest advocates of trade unionism that persons should be liable for concerted as well as for individual action; and for this purpose it seems to me that it cannot matter in the least whether the persons acting in concert be combined together in a trade union, or collected and united under any other form of association.

Then, if trade unions are not above the law, the only remaining question, as it seems to me, is one of form. How are these bodies to be sued? I have no doubt whatever that a trade union, whether registered or unregistered, may be sued in a representative action if the persons selected as defendants be persons who, from their position, may be taken fairly to represent the body. As regards this point, Mr. Haldane relied on

(1) P. xxxi.

the case of *Temperton* v. *Russell* (1); but *Temperton* v. *Russell* (1), as I said in *Duke of Bedford* v. *Ellis* (2), was an absurd case. The persons there selected as representatives of the various unions intended to be sued were selected in defiance of all rule and principle. They were not the managers of the union—they had no control over it or over its funds. They represented nobody but themselves. Their names seem to have been taken at random for the purpose, I suppose, of spreading a general sense of insecurity among the unions who ought to have been sued, if sued at all, either in their registered name, if that be permissible, or by their proper officers—the members of their executive committees and their trustees.

Mr. Haldane, indeed, was bold enough to say that if a wrong was committed by a body of persons, acting in concert, who were too numerous to be made defendants in an action, the person injured would be without remedy, unless he could fasten upon the individuals who with their own hands were actually doing the wrong. Then he was asked, what would he say to such a case as this: Suppose there were a manufactory belonging to a co-operative society, unregistered, and composed of a great number of persons (as there well might be, but for the provision in the Companies Act making illegal an unregistered trading society consisting of more than twenty members), and suppose such a manufactory were poisoning a stream or fouling the atmosphere to the injury of its neighbours, might it do so with impunity? Mr. Haldane said Yes, you must pounce upon the individual offenders. It seems to me that this is a reduction to absurdity. I should be sorry to think that the law was so powerless; and therefore it seems to me that there would be no difficulty in suing a trade union in a proper case if it be sued in a representative action by persons who fairly and properly represent it.

The further question remains: May a registered trade union be sued in and by its registered name? For my part, I cannot see any difficulty in the way of such a suit. It is quite true that a registered trade union is not a corporation, but it has a registered name and a registered office. The registered name is

(1) [1893] 1 Q. B. 435. (2) Ante, p. 1.

H. L. (E.) 1901

TAFF VALE RAILWAY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS.

Lord Macnaghten.

nothing more than a collective name for all the members. The registered office is the place where it carries on business. A partnership firm which is not a corporation, nor, I suppose, a legal entity, may now be sued in the firm's name. And when I find that the Act of Parliament actually provides for a registered trade union being sued in certain cases for penalties by its registered name, as a trade union, and does not say that the cases specified are the only cases in which it may be so sued, I can see nothing contrary to principle, or contrary to the provisions of the Trade Union Acts, in holding that a trade union may be sued by its registered name.

I am, therefore, of opinion that the appeal should be allowed and the judgment of Farwell J. restored with costs, here and below.

My noble and learned friend Lord Shand, who is unable to be present this morning, has asked me to read the following judgment.

LORD SHAND. My Lords, I am also of opinion that the judgment of the Court of Appeal should be recalled and the judgment of Farwell J. restored, and an injunction granted against the respondents in the terms settled by his Lordship.

The admirable judgment of Farwell J., in whose reasoning I entirely agree, makes it unnecessary again to go over the provisions of the statutes of 1871 and 1876, particularly after what has been said by your Lordships. I shall only add a few words in regard to the judgment of the Court of Appeal. It is true, as repeatedly stated both by Farwell J. and by the Master of the Rolls, that by neither of the statutes are trade unions, although registered, declared to be incorporations, which would as a consequence give them a right to sue and render them liable to be sued in the society's name. It is equally true, as the Master of the Rolls observes, that the right to sue and liability to be sued may be conferred by statute either expressly or by implication. In the words of the learned Master of the Rolls, enactments "must be found either express or implied enabling this to be done." I agree in thinking there is no express enactment to that effect; but, with great deference, in

my opinion, the power of suing and liability to be sued in the society's name is clearly and necessarily implied by the provisions of the statutes. If Farwell J. had not carefully gone over and pointed out these provisions in his judgment, I should have thought it right now to do so, but I content myself by referring to what he has so well said. A registered trade union has an exclusive right to the name in which it is registered, a right to hold a limited amount of real estate and unlimited personal estate for its own use and benefit and the benefit of its members, the power of acting by its agents and trustees, and is liable to be sued for penalties, as it appears to me, in the society's name. I am clearly of opinion that these and the provisions generally of the statutes imply a liability on the society to be sued in its trade union name, and a privilege of thus suing.

I am further of opinion that, as the society by its agents is alleged to have been violating the law as stated by the appellants and sworn in their affidavits, the appellants are entitled to an injunction not only against the agents, but against the society itself, for whom their servants and agents were acting.

LORD BRAMPTON. My Lords, I shall trouble your Lordships with but a few words, for I entirely concur in the judgment and words of the Lord Chancellor in adopting the judgment of Farwell J. I do not think this House is called upon to do more to-day than determine whether a primâ facie case has been disclosed by the Taff Vale Railway Company entitling them to the injunction they claimed, and whether the trade union society can be sued for such an injunction in its registered name. I think both these questions ought to be answered in the affirmative.

The lawless acts alleged to have been committed, and the continuance of which was more than probable, were clearly wrongful acts which justified the Taff Vale Railway Company in seeking to have them restrained by those who caused them to be committed, and inasmuch as they were done by men acting as agents of the society in furtherance of a strike sanctioned and directed by its authorized officers, the society is

H. L. (E.) 1901

TAFF VALE RAILWAY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS.

Lord Brampton.

responsible for them. Whether it is so responsible in and by its registered name is the only remaining question.

I see no reason why this question should not also be answered in the affirmative. I think that a legal entity was created under the Trade Union Act, 1871, by the registration of the society in its present name in the manner prescribed, and that the legal entity so created, though not perhaps in the strict sense a corporation, is nevertheless a newly created corporate body created by statute, distinct from the unincorporated trade union, consisting of many thousands of separate individuals, which no longer exists under any other name. The very omission from the statute of any provision authorizing and directing that it shall sue and be sued in any other name than that given to it by its registration appears to me to lead to no other reasonable conclusion than that in so creating it, it was intended by the Legislature that by that name and by no other it should be known, and that for all purposes that name should be used and applied to it in all legal proceedings unless there was any other provision which militated against such a construction, as, for instance, in the case of trustees, by s. 9 of the same Act, who hold real and personal property of the society. I may refer also to the effect of the rules with regard to the present registration. I find on page 91 of the Appendix that rule 7 (3) provides that the funds of every branch shall be the common property of the society. That being so, I do not see how it would be possible for these funds to be made applicable for remuneration or recompense or redress for any wrongful act done by a body of men like the society unless the society can be sued in the way in which it is proposed to sue them, and as I think it may be.

For the reasons I have very shortly given, I am of opinion that the judgment of the Court of Appeal should be reversed, and the judgment of Farwell J. restored.

LORD LINDLEY. My Lords, the problem how to adapt legal proceedings to unincorporated societies consisting of many members is by no means new. The rules as to parties to common law actions were too rigid for practical purposes when

those rules had to be applied to such societies. But the rules as to parties to suits in equity were not the same as those which governed courts of common law, and were long since adapted to meet the difficulties presented by a multiplicity of persons interested in the subject-matter of litigation. Some of such persons were allowed to sue and be sued on behalf of themselves and all others having the same interest. This was done avowedly to prevent a failure of justice: see *Meux* v. *Maltby* (1) and the observations of Sir George Jessel M.R. (2)

The principle on which the rule is based forbids its restriction to cases for which an exact precedent can be found in the reports. The principle is as applicable to new cases as to old, and ought to be applied to the exigencies of modern life as occasion requires. The rule itself has been embodied and made applicable to the various Divisions of the High Court by the Judicature Act, 1873, ss. 16 and 23–25, and Order XVI., r. 9; and the unfortunate observations made on that rule in *Temperton* v. *Russell* (3) have been happily corrected in this House in the *Duke of Bedford* v. *Ellis* (4) and in the course of the argument in the present case.

I have myself no doubt whatever that if the trade union could not be sued in this case in its registered name, some of its members (namely, its executive committee) could be sued on behalf of themselves and the other members of the society, and an injunction and judgment for damages could be obtained in a proper case in an action so framed. Further, it is in my opinion equally plain that if the trustees in whom the property of the society is legally vested were added as parties, an order could be made in the same action for the payment by them out of the funds of the society of all damages and costs for which the plaintiff might obtain judgment against the trade union.

I entirely repudiate the notion that the effect of the Trade Union Act, 1871, is to legalise trade unions and confer on them the right to acquire and hold property, and at the same time to protect the union from legal proceedings if their managers or agents acting for the whole body violate the rights of other

(1) (1818) 2 Sw. 277.
(2) *Commissioners of Sewers* v. *Gellatly*, (1876) 3 Ch. D. 615.
(3) [1893] 1 Q. B. 435.
(4) Ante, p. 1.

H. L. (E.) 1901

TAFF VALE RAILWAY v. AMALGAMATED SOCIETY OF RAILWAY SERVANTS.

Lord Lindley.

people. For such violation the property of trade unions can unquestionably in my opinion be reached by legal proceedings properly framed. The Court of Appeal has not denied this; but the Court has held that the trade union cannot be sued in its registered name, and in strictness the only question for determination by your Lordships now is whether the Court of Appeal was right in holding that the name of the trade union ought to be struck out of the writ, and that the injunction granted against the trade union in that name ought to be discharged.

If I am right in what I have already said, this question is of comparatively small importance: it is not a question of substance but of mere form, and turns on the Trade Union Act, 1871 (34 & 35 Vict. c. 31), and the Act of 1876 (39 & 40 Vict. c. 22) amending it. The Act does not in express terms say what use is to be made of the name under which the trade union is registered and by which it is known. But a trade union which is registered under the Act must have a name: see ss. 14, 16, and Sched. I.; it may acquire property, but, not being incorporated, recourse is had to the old well-known machinery of trustees for acquiring and holding such property, and for suing and being sued in respect of it (ss. 7, 8, 9). The property so held is, however, the property of the union: the union is the beneficial owner. Sect. 12 provides summary remedies for misapplications of the trade union's property, but there is nothing here to oust the jurisdiction of the superior Courts, and, there being nothing in the Act to prevent it, I cannot conceive why an action in the name of the trade union against its trustees to restrain a breach of trust or to make them account for a breach of trust already committed should be held unmaintainable or wrong in point of form. Further, ss. 15 and 16 of the Act of 1871, and s. 15 of the Act of 1876, impose duties on registered trade unions and penalties on them (and not only on their officials) for breach of those duties. The mode of enforcing these penalties is pointed out in s. 19 of the Act of 1871, but there is nothing there to shew that the trade union on which the duty is cast and which has to pay the penalty could not be proceeded against in its registered name. Again, I apprehend that a mandamus could go against

a trade union to compel it to perform the duties cast upon it by statute; and here again the obvious course would be to proceed against the union by its registered name unless there is something in the statute to prevent it. My Lords, a careful study of the Act leads me to the conclusion that the Court of Appeal held, and rightly held, that trade unions are not corporations; but the Court held further that, not being corporations, power to sue and be sued in their registered name must be conferred upon them; and further that the language of the statutes was not sufficient for the purpose. Upon this last point I differ from them. The Act appears to me to indicate with sufficient clearness that the registered name is one which may be used to denote the union as an unincorporated society in legal proceedings as well as for business and other purposes. The use of the name in legal proceedings imposes no duties and alters no rights: it is only a more convenient mode of proceeding than that which would have to be adopted if the name could not be used. I do not say that the use of the name is compulsory, but it is at least permissive.

Your Lordships have not now to consider how a judgment or order against a trade union in its registered name can be enforced. I see no difficulty about this; but, to avoid misconception, I will add that if a judgment or order in that form is for the payment of money it can, in my opinion, only be enforced against the property of the trade union, and that to reach such property it may be found necessary to sue the trustees.

I am of opinion that the orders of Farwell J. were right and should be restored.

Orders of the Court of Appeal reversed and judgments of Farwell J. restored with costs here and below; cause remitted to the King's Bench Division.

Lords' Journals, July 22, 1901.

Solicitors: *Williamson, Hill & Co., for Ingledew & Sons, Cardiff; Riddell & Co., for Meyrick, Davies & Forsdike, Cardiff.*

H. L.
1901
July 18.

THE TRIAL OF EARL RUSSELL.

(Before the King in Parliament.)

Bigamy—Second Marriage performed Abroad—Offences against the Person Act, 1861 (24 & 25 *Vict. c.* 100), *s.* 57.

By the Offences against the Person Act, 1861, s. 57, "Whosoever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony":—

Held, that the section extends to a case where the second marriage is celebrated beyond the King's dominions.

This was a prosecution initiated by the Director of Public Prosecutions against Earl Russell for bigamy in America.

Earl Russell was married to Mabel Edith Scott on February 6, 1890, in England. Much litigation followed between Earl Russell and his wife from 1890 to 1897. (1) On April 14, 1900, Earl Russell obtained from the First Judicial District for the county of Douglas in the State of Nevada, in the United States of America, an order for divorce from his wife; and on April 15 he went through the ceremony of marriage before Judge Curler in the State of Nevada with one Mollie Cooke, otherwise known as Mrs. Somerville. In June, 1890, Mabel Edith, Lady Russell, presented a petition against Earl Russell for divorce on the ground of his bigamous adultery, and on March 24, 1901, a decree nisi was pronounced, the suit being undefended.

On June 17, 1901, Earl Russell was arrested and charged with bigamy. Subsequently the grand jury found a true bill, and the Recorder wrote to the House of Lords informing their Lordships that a true bill had been found against Earl Russell, a Peer of the Realm.

(1) See [1897] A. C. 395.

Arrangements were then made for the trial of Earl Russell before his Peers in the Royal Gallery (Parliament being then in session) (1), and the King issued a Commission appointing the Earl of Halsbury L.C. to preside at the trial as Lord High Steward.

On July 2 Earl Russell was taken into custody by the Gentleman Usher of the Black Rod, and it was moved in the House that the bill of indictment for felony found by the grand jury be removed before the House by writ of certiorari. This was done, and Earl Russell was allowed to enter into recognizances with two sureties to appear before the House at any time he should be so ordered. (2) The trial was fixed for July 18. On July 4, 1901, the House met to consider Earl Russell's application for an adjournment to next session in order to produce evidence from America as to his change of domicil to America and as to the validity of the Nevada divorce. The Attorney-General, for the Crown, opposed such a long adjournment on the ground that Judge Curler, who was now in this country, would probably be unable to attend to give evidence next session.

The House granted a postponement until August 6, provided affidavits were lodged specifying the American evidence and witnesses to be called. This extension was declined by Earl Russell.

The Trial.

July 18. The Earl of Halsbury L.C. presided as Lord High Steward. There were also present about 160 Peers, including all the Law Lords who generally hear appeals, and the following judges: Sir Francis Jeune, and Mathew, Wills, Wright, Lawrance, Kennedy, Darling, Bigham, Cozens-Hardy, Farwell, and Buckley JJ.

The King's Commission, the writ of certiorari, the return thereof, and the indictment having been read, Earl Russell was called upon to plead guilty or not guilty.

(1) [For the constitution and style of the Court, see Foster, Crown Law, pp. 141, 142, 143.—F. P.]

(2) See Journals of House of Lords, July 2, 1901.

H. L. 1901

THE TRIAL OF EARL RUSSELL.

Sir R. B. Finlay, A.-G., Sir Edward Carson, S.-G., H. Sutton, R. D. Muir, Bodkin, and *G. R. Askwith,* appeared for the Crown.

Robson, K.C., Horace Avory, K.C. (with them *Charles Mathews, Llewelyn Davies,* and *J. H. W. Pilcher*), for Earl Russell.

Before the defendant pleads to this indictment it is submitted that the indictment ought to be quashed, inasmuch as it discloses no offence according to the true construction of the 57th section of the Offences against the Person Act, 1861. The section defining the offence does not in express terms apply to any offence committed beyond the King's dominions. According to the well-known rule of construction in every Act passed by our Parliament, words, however wide, with reference to area must have read along with them a reference to the King's dominions, unless very express words are added in the Act shewing that it was the intention of the Legislature to make justiciable offences committed outside the King's dominions. The word "elsewhere" must be read with a limitation—that is, it means "elsewhere" within the King's dominions. This is shewn by ss. 9 and 4 of this very Act, where the framers of the statute did not consider the preliminary words "where any murder, &c., shall be committed on land out of the United Kingdom" sufficiently wide to cover offences committed outside His Majesty's dominions, and added the express words which are absent from s. 57, "whether within the Queen's dominions or without." Therefore, if the words "or elsewhere" had been intended to apply to places beyond the King's dominions, words would have been added to that effect.

[THE LORD HIGH STEWARD referred to the proviso in s. 57. Has not the Imperial Legislature a right to legislate with respect to His Majesty's subjects all over the world wherever they are?]

Undoubtedly. But if s. 57 had been intended to apply to countries abroad, words would have been inserted for that purpose. The reasons given for the decision in *Macleod* v. *Attorney-General for New South Wales* (1) apply here.

(1) [1891] A. C. 455.

[They also referred to *Powell* v. *Apollo Candle Co.* (1); Lord Bramwell in *Santos* v. *Illidge* (2); *Reg.* v. *Debruiel* (3); *United States* v. *Holmes* (4); *Reg.* v. *Topping* (5); 1 Hale's Pleas of the Crown, 692, 693; 1 Jac. 1, c. 11, s. 1; 9 Geo. 4, c. 31, s. 22.]

THE LORD HIGH STEWARD. My Lords, we have the advantage of having His Majesty's judges here. I have been myself of opinion for some time that the matter which has been discussed at such inordinate length was really too plain for argument. The statute is plain in its ordinary signification, and the only ground upon which the learned counsel can suggest that we should not give it its ordinary signification is apparently because of the use of certain words in other statutes enacted under other circumstances in relation to other crimes. My Lords, I thought it right to ask His Majesty's judges whether there is anything in the argument suggested which should call for the Attorney-General to reply; and they are unanimously of opinion that there is not, and that it is not necessary to hear the Attorney-General.

Thereupon, Earl Russell having under the advice of his counsel pleaded guilty,

Robson, K.C., addressed their Lordships on the mitigation of punishment; and Earl Russell was also allowed to make a speech.

Sentence—Three calendar months' imprisonment in His Majesty's prison at Holloway as an offender of the First Division.

Lords' Journals, July 2, 4, 18, 1901.

Solicitor for the Crown: *Solicitor to the Treasury.*
Solicitors for Earl Russell: *Vandercom & Co.*

(1) (1885) 10 App. Cas. 282.
(2) (1860) 29 L. J. (C.P.) 348, 352.
(3) (1861) 11 Cox C. C. 207.
(4) (1820) 18 U. S. 412.
(5) (1856) Dears. C. C. 647; 7 Cox C. C. 103.

[HOUSE OF LORDS.]

H. L. (D.) 1901 July 30.

EARL COWLEY . . . . . APPELLANT;

AND

COUNTESS COWLEY . . . . . RESPONDENT.

Married Woman—Dignity—Title of Honour—Incorporeal Hereditament—Marriage with a Peer of the Realm—Divorce—Former Wife marrying a Commoner—Continued use of Title derived from former Husband—Injunction—Jurisdiction of Divorce Court.

Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, and she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possesses in his title, as to entitle him, in the absence of malice, to an injunction to restrain her use of the title.

Only the House of Lords can try questions of right in matters of peerage or dignities connected therewith.

APPEAL against the decision of the Court of Appeal, dated August 8, 1900 (1), reversing the judgment of Gorell Barnes J., dated February 7, 1900. (2) By original notice of motion Earl Cowley, the appellant, formerly a respondent in a suit for dissolution of marriage at the instance of his wife, asked the Court to restrain the respondent, his former wife, now the wife of a commoner, R. E. Myddelton Biddulph (now known as R. E. Myddelton), from bearing the name and arms of the appellant.

The notice of motion purported to be given in the divorce proceedings, but, at the suggestion of Gorell Barnes J., it was agreed by counsel for both parties that the motion should be treated as if it were a motion to restrain the respondent from using the style or title "Countess Cowley" in an action for that purpose in the High Court, and the arguments proceeded on that basis.

The facts are given in Lord Macnaghten's opinion.

(1) [1900] P. 305. (2) [1900] P. 118.

July 19, 22. *Haldane, K.C.* (with him *Bargrave Deane, K.C.*, and *C. J. Willock*), for the appellant. The dignity is something more than a mere name—it is an incorporeal hereditament: *In re Sir J. Rivett-Carnac's Will.* (1) Every woman who marries a peer becomes entitled to the same dignity as her husband, and acquires all the rights and privileges of peerage which are consistent with her sex—that is, if she is accused of treason or felony she can only be tried by her peers: Cruise on Dignities, ch. 3, pars. 80 to 87; 20 Hen. 6, c. 9. But, then, if a woman who has acquired a dignity by marriage afterwards marries a commoner she loses her dignity: 6 Coke, 52 b; Coke on Litt. 16 b. In the Journals of the House for 1661 (July 4, p. 298) the House, on the report from the Committee for Privileges, declared—having received the opinion of all the judges now present in point of law—that Lady Dacre, by marrying Mr. Chute, a commoner, had forfeited and lost her privilege of peerage in law, and it was ordered that the trial at law should proceed notwithstanding any claim of privilege by the said Lady Dacre (2): see also *Haward and Wife* v. *Duke of Suffolk.* (3)

[LORD MACNAGHTEN. Notwithstanding that order in Lady

(1) (1885) 30 Ch. D. 136.

(2) The old manuscript Journals and minutes of the Committee for Privileges were sent for, and it appeared from the latter that Lady Dacre, wife of Richard, Lord Dacre, had married a commoner, and in 1661 was defendant in an ejectment in the Common Pleas. She—July 1, 1661—petitioned the Lords assembled in Parliament, alleging that she was by the ancient privileges of peers freed from suits and trouble in their person and estates during the Parliament. The minute of July 3, 1661, sets out that Lady Dacre's counsel was called in to know how far the lady appeared in the suit. The lady did appear in the Court of Common Pleas and made oath that the lands were hers. "Resolved that the lady having waived her privilege by appearing in the Court in this cause shall not now enjoy it," carried in the affirmative. The manuscript minute of the Journals, dated July 4, 1661, was: "The Lord Chief Justice of the Common Pleas coming from off the bench where ye Lady Dacre had a cause in agitation, who was a widow of a peer but marries after a commoner. The House inquired (of) the judges now in the House whether she by her marriage had not lost her privilege, who were all of opinion that she had lost it, and so my Lords determined the case; and the Lord Chief Justice repaired back to the Court."

(3) (1552) Dyer, 79 b.

H. L. (D.) 1901 EARL COWLEY v. COUNTESS COWLEY.

Dacre's case, the resolution of the House styles her "Lady Dacre."]

The respondent ceasing to be the wife of Earl Cowley, it is a trespass or a usurpation amounting to a legal wrong for her to still call herself Countess Cowley. A woman falsely saying she is a wife—although it is not suggested the respondent does that—is guilty of a malicious offence: see Lord Stowell in *Hawke* v. *Corri*. (1) The respondent claims to call herself Countess Cowley—that is, that she is one of the persons entitled to participate in the dignity which Earl Cowley bears. She has no colour of right to do this. The dignity carries with it a substantial right. It is an incorporeal hereditament, and it is an injury to him to claim to participate in his dignity. It diminishes the right. In 1692 (2) this House ordered and declared that if the widow of any peer shall marry a commoner she shall not be allowed privilege of peerage: see also Doddridge J. in Collins' Peerage, p. 130. [He also cited *Fendall* v. *Goldsmid* (3), Cruise on Dignities, ch. 6, pp. 304–5, and *Ashby* v. *White* (4).]

[THE EARL OF HALSBURY referred to a note in Salkeld, 450, on an indictment styling an eldest son by his father's second title.]

Lawson Walton, K.C. (with him *Mark L. Romer*), for the respondent. Although the legal title is lost by marriage, yet it is retained by courtesy, and also, although in a legal document a lady of title must bear her husband's name, yet in society as a matter of courtesy she retains her title. Each Sovereign determines whether a widow of a peer shall be received at Court under her former title. At the Coronation of James II. application was made by ladies to retain their rank by their first marriage, and in some cases leave was given. It is not suggested that the respondent is actuated by malice or the smallest ill-will. It is not contended that Countess Cowley wishes to create an impression that the marriage still subsists. She wishes when her son grows up

(1) (1820) 2 Hagg. Con. 280, 285.
(2) 15 Lords' Journals, p. 241.
(3) (1877) 2 P. D. 263.
(4) 1 S. L. C. 231.

with his father's family that he should look on her as belonging to the same family. There are many cases where ladies of title married to commoners still maintain their title. This was not a case for a Court of Law, but for a Committee for Privileges. No one has heard of a case where a Court of Law has restrained a peer's widow, after a second marriage, from calling herself by her former title. One cannot understand how it can be made out that Countess Cowley claims to participate in Earl Cowley's hereditament. Unless Earl Cowley can establish disturbance, annoyance, or damage, his action must fail.

Haldane, K.C., in reply.

The House took time for consideration.

July 30. EARL OF HALSBURY L.C. My Lords, in this case I wish to say that if the matter were res integra, and if what I am about to say did not arise, the reasoning of the Court of Appeal appears to me to be just and sound, and I should move your Lordships that the appeal be dismissed with costs; but I think it is material that one should consider for a moment whether or not any such suit can be entertained. I do not wish to express any final opinion as to whether such a suit could be maintained if there were the elements of annoyance or malice, though I confess there is a doubt in my own mind whether even in such cases an action on the case would not be very difficult to maintain; but given, as it is assumed here, that there was no malice and no annoyance, and no either implied or expressed assertion of marriage so as to give rise to a suit of jactitation, the simple broad question being whether this lady who, it is not doubted, bonâ fide, claims a right, and intends to claim a right, to be known by the name by which during the whole period of her married life she undoubtedly was known, can retain that right notwithstanding the divorce, it seems to me absolutely clear that no such suit could be entertained.

My Lords, more than one reason occurred to my mind in considering this question. I do not know what jurisdiction the Divorce Court had in dealing with this matter at all. It

H L. (D.)
1901
EARL COWLEY
v.
COUNTESS COWLEY.
Earl of Halsbury L.C.

seems to have been assumed that it had reference to the divorce; but Mr. Haldane has very candidly admitted that it is not a question of divorce at all, nor has the Divorce Court by any stretch of its jurisdiction any right to determine this question simply because there has been a divorce suit, and the lady who by her petition has succeeded in getting rid of her husband now claims to call herself by the name by which she has been known. What jurisdiction Gorell Barnes J. had to entertain this question I confess I am wholly at a loss to understand. And, further, it seems to me that if Mr. Haldane had been successful in suggesting that this was a case in which there was a sort of territorial right in respect of a dignity, he would only by another process shew that he was hopelessly out of Court; because what jurisdiction has any Court of Law to determine a question of a dignity? I am not aware of any such jurisdiction. If indeed there was a claim to such a right, the jurisdiction would be vested in this House not as an Appellate Court from a Court of Law, but in its own inherent jurisdiction as the Committee for Privileges. It has been laid down that no question of honour can be tried by a Court of Law. Where there was a question of a fine quoted in Collins, and ancillary to it a question of a dignity, it was said by the learned judges in that case that they are not going to allow by a side-wind a matter outside their jurisdiction to be brought in upon the pretence that there is a question which the ordinary Courts by an action in the Court of Common Pleas had a right to determine.

Under these circumstances it appears to me there is not the faintest shadow of a foundation for this suit, and I am a little surprised that in the elaborate argument of the learned judge, Gorell Barnes J., he should never have considered at all what a curious thing it would be in our jurisprudence if because a thing might be considered convenient, and, I will assume for the sake of argument, desirable, therefore you could invent a new jurisdiction and apply it to a matter with which that Court has no concern whatever.

My Lords, under these circumstances I have thought it right to say this much. I think it is not a very abstruse point. It is

admitted by everybody that no such case was ever heard of before, and that the question might equally arise, not only in the case of two persons divorced, but even in the case of a courtesy title to certain ranks of peerage. That a Court of Law should concern itself with such a question as that is certainly not a thing to be desired, but it is enough to say that for a Court of Law there is no foundation for any jurisdiction, and there is no precedent to be found where such a question has ever been decided. My Lords, under these circumstances, for these additional reasons besides those which the Court of Appeal have given, and with which I entirely concur if the matter was to be reasoned upon that footing at all, I think this appeal ought to be dismissed and with costs; and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I am of the same opinion and substantially on the same grounds.

It seems to me that the present controversy between Earl Cowley and the lady who was his wife is a matter with which no Court of Law has any concern.

The position of the parties is clear enough. In 1889 Lady Violet Nevill married Lord Dangan. On his succeeding to the Earldom of Cowley she became Countess Cowley, and entitled to the privileges of peerage. She obtained a divorce from her husband on the ground of his misconduct. It was conceded, and I suppose rightly conceded, that there was nothing in her position as the divorced wife of Earl Cowley to deprive her either of the title or the privileges which she had acquired as his wife. Then she married a commoner, and thereupon she lost her right to the title of Countess and the privileges of peerage. Still everybody knows that it is a very common practice for peeresses (not being peeresses in their own right) after marrying commoners to retain the title lost by such marriage. It is not a matter of right. It is merely a matter of courtesy, and allowed by the usages of society. In accordance with this usage the respondent still calls herself Countess Cowley. The appellant complains. He says she has no right to do so. That is perfectly true. And then he claims an

H. L. (D.) 1901

EARL COWLEY v. COUNTESS COWLEY.

Lord Macnaghten.

injunction from a Court of Law to prevent his late wife using that designation on the ground that it is an invasion or disturbance of the dignity which belongs to him as an incorporeal hereditament.

The answer seems to be two-fold. If it be a disturbance of a dignity, that is a matter not within the cognizance of a Court of Law. The right to a peerage can only be tried before the peers. And it was declared long ago that "it appertained altogether to the Royal prerogative to give such honour, reputation, and placing to his counsellors and others his subjects as should be seeming to the King's most excellent wisdom." (1)

There is another answer which to my mind is equally conclusive. It is that Lord Cowley has not suffered either legal wrong or damage. Mr. Haldane argued that a legal wrong had been done to him because the respondent without colour of right claimed to share or participate in his incorporeal hereditament—the Earldom of Cowley. For my part I must confess I cannot understand in what sense it can be said that the lady claims to participate or share in this hereditament. I can understand the other Lady Cowley complaining. It is, or may be, inconvenient to her that another lady should use the same title which may have the effect of relegating her to the less coveted style of Dowager. But it seems to me that there is no substance in Lord Cowley's complaint, and that he at least suffers no damage. And, therefore, even if the matter were cognizable at law, I should hold that there was no right to an injunction. There is no precedent for such an order, and I should be very sorry to advise your Lordships to make a precedent in this case.

Lady Dacre's case, on which Mr. Haldane relied, seems to me not to be altogether in his favour. This House declared on the opinion of the judges present that the Lady Dacre (2), by marrying Mr. Chute, a commoner, had lost her privilege of peerage in law. But still it is to be observed that the resolution of this House speaks of her as "the Lady Dacre," from which I think it may be inferred that the adherence to that

(1) 31 Hen. 8, c. 10.

(2) Journals of the House, July 4, 1661, p. 298.

style, even after the privilege of peerage was lost, was not so shocking a thing as Mr. Haldane would have your Lordships to understand.

I am, therefore, of opinion that the appeal must be dismissed with costs.

LORD JAMES OF HEREFORD. My Lords, there being no pleadings in this case, your Lordships must look at the arguments of counsel to learn upon what ground the present application for an injunction is made. From those arguments I gather that the injunction to restrain the respondent from terming herself Countess Cowley is based on the following grounds: It is said that Lord Cowley being in possession of the Earldom holds an incorporeal hereditament, which is property, in the possession of which he alleges he has been disturbed by the retention of the name of Countess Cowley by the respondent. To establish the alleged disturbance I understood Mr. Haldane to argue at the bar that the respondent by virtue of her marriage with a commoner has lost her right to bear the title of nobility. It will be observed that this proposition in no way calls in aid the fact of a divorce having been decreed. If the respondent had been a widow, the same question as that now before your Lordships would have arisen.

Mr. Haldane's argument was founded upon a dictum in Coke on Littleton (1 Coke 16 b) which says: "And there is a diversitie betweene a woman who is noble by descent and a woman that is noble by marriage. For if a woman that is noble by descent, marrie one that is under the degree of nobilitie yet she remaineth noble still; but if she gaine it by marriage, she loseth it if she marry under the degree of nobilitie and so is the rule to be understood, si mulier nobilis nupserit ignobili desinit esse nobilis. But if a duchesse by marriage marrieth a baron of the realme, she remaineth a duchesse and loseth not her name, because her husband is noble; et sic de cæteris."

My Lords, it may be that this dictum of Lord Coke is quite correct. I express no opinion upon that. But the disregard of it in my opinion does not constitute a disturbance of any property. Effect may be given to it if, for instance, in

H. L. (D.) 1901 EARL COWLEY v. COUNTESS COWLEY. Lord James of Hereford.

Parliament the respondent sought to plead her privilege of Parliament. But the case now before your Lordships is by way of appeal from a decree of a Court of Law, and in my opinion such Courts have no power to control the action of a person who, under the conditions existing in this case, assumes the name, not for the purposes of fraud or molestation, but on a bonâ fide claim of right.

I further concur with the views which have been expressed by my noble and learned friend on the Woolsack and Lord Macnaghten, that the jurisdiction to try all questions of right connected with peerage and all dignities connected with peerages lies in this House and not in a Court of Law.

LORD BRAMPTON. My Lords, I so entirely agree in the judgment which has been pronounced by the Lord Chancellor that I think it is unnecessary to add one word.

LORD LINDLEY. My Lords, by letters patent under the Great Seal, dated April 11, 1857, the dignity of the Earldom of Cowley was granted to the then Baron Cowley and the heirs male of his body. The dignity so granted was an incorporeal hereditament: Cruise's Dig. ch. 4, par. 1; and such hereditament was granted for an estate in tail male. In 1895 this estate became vested in the present Earl, and it has ever since been and is now vested in him.

In 1889 the present Earl Cowley married Lady Violet Nevill. She was a daughter of a peer, and therefore of noble blood; but she was not a peeress in her own right. When in 1895 her husband became Earl Cowley she acquired an estate for life in his dignity: see Co. Litt. 16 b. That has been the law ever since Coke's time, and it is not, I believe, disputed. Her life estate was not determinable on the death of her husband, but was determinable on a second marriage with a commoner: see Co. Litt. 16 b. So long as her life estate in the Earldom was undetermined she was entitled to the honour and dignity of a peeress and to the name attached to it.

In 1897 the Countess Cowley obtained a divorce from her husband; but, although the divorce dissolved her marriage, it did not determine her life estate in the peerage which she had already acquired. There is no principle of common law, nor is there anything in the Divorce Act, which produces any such result. The case of *Fendall* v. *Goldsmid* (1) goes far to shew that so far as name is concerned the Countess was entitled to continue after the divorce to use the name and style which she had previously acquired the right to use.

In July, 1898, however, Lady Cowley married a commoner, and it seems clear that, although she did not lose the position to which she was entitled by birth, her life estate in the dignity which she had acquired by marriage ceased: see Co. Litt. 16 b. All the authorities are clear upon that point, whatever doubt there may be as to the effect of a lady marrying a peer lower in dignity than her first husband. But, although by her second marriage the Countess Cowley ceased to be a peeress, the usages of society are such as to entitle her by courtesy to her old name. The entry in the Journals of this House in the case of *Lady Dacre* (2) shews the recognition of this usage by the Committee for Privileges of this House. The question your Lordships have to determine is whether Earl Cowley is entitled to an injunction from the High Court to restrain his former wife from still calling herself Countess Cowley. Gorell Barnes J. decided this question in favour of the Earl, and granted an injunction restraining her "from using the style or title of Countess Cowley." The Court of Appeal reversed this decision, and the Earl has appealed to your Lordships to restore it.

My Lords, we are not now sitting as a Committee for Privileges to determine a claim to the dignity created and granted by the letters patent of 1857. The lady calls herself, and is called in society, Violet, Countess Cowley; she makes no claim to the peerage or to the dignity which is vested in her late husband; and if she did the High Court would not be the proper tribunal to entertain or decide such a claim. Chap. 6

(1) 2 P. D. 263. (2) 1661, p. 298.

H. L. (D.) 1901 EARL COWLEY v. COUNTESS COWLEY. Lord Lindley.

of Cruise on Dignities is conclusive on that. The appellant's counsel urged your Lordships to take the view that the Countess was disturbing the Earl in the enjoyment of his dignity, i.e., of the incorporeal hereditament to which he is entitled. On reference to the authorities relating to actions on the case for disturbance, I can find no instance of an action for disturbing a dignity; nor any instance of an action for disturbing any incorporeal hereditament in the absence of actual damage. Damage is essential to the violation of such a right: see Com. Digest, Action on the case for disturbance; Roscoe on Real Actions, 353.

The controversy between the parties is thus reduced to a dispute about the use of a name as distinguished from a dignity. Speaking generally, the law of this country allows any person to assume and use any name, provided its use is not calculated to deceive and to inflict pecuniary loss. Your Lordships will find the law on this subject examined in a very instructive note from the pen of the late Mr. Waley in 3 Davidson's Conveyancing, pt. 1, p. 283, 2nd ed. The judgment of Tindal C.J. in *Davies* v. *Lowndes* (1) and of the Privy Council delivered by Lord Chelmsford in *Du Boulay* v. *Du Boulay* (2) leave no doubt about it. Lord Chelmsford in *Du Boulay* v. *Du Boulay* (2) stated that "in this country we do not recognise the absolute right of a person to a particular name to the extent of entitling him to prevent the assumption of that name by a stranger." Then, after alluding to trade names, the judgment continues: "The mere assumption of a name which is the patronymic of a family by a stranger who has never before been called by that name, whatever cause of annoyance it may be to a family, is a grievance for which our law affords no redress."

My Lords, if this is true of strangers, it is a fortiori true of persons who have once acquired the right to use a name which the usages of society allow them to retain. The Court of Appeal held, and in my opinion correctly held, that the Earl's rights are not infringed by what his late wife insists on doing. To grant the injunction asked by the Earl would not, therefore,

(1) (1835) 1 Bing. N. C. 597, 618. (2) (1869) L. R. 2 P. C. 430.

be legally just. The inconvenience of granting it is great and obvious, having regard to the long-established and well-known usages of English society. Nor is it immaterial to bear in mind that the Sovereign can at any moment confer on the Countess the privilege of using the name, style, and title which the Earl complains of her using. The case cannot be brought within s. 25, clause 8, of the Judicature Act, 1873, which authorizes the High Court to grant an injunction in all cases in which it shall appear to the Court to be just or convenient to do so. The decision of the Court of Appeal ought in my judgment to be affirmed, and this appeal should be dismissed with costs.

Ordered, that the appeal be dismissed with costs.

Lords' Journals, July 30, 1901.

Solicitors for appellant: *Wontner & Sons*
Solicitors for respondent: *Lewis & Lewis.*

G. J. W.

[HOUSE OF LORDS.]

H. L. (E.) 1901 *July* 22.

WILLIAMS & CO. AND THE BRANKELOW STEAMSHIP COMPANY. . . } APPELLANTS;

AND

THE CANTON INSURANCE OFFICE, LIMITED . . . . . } RESPONDENTS.

Insurance (Marine) on "Freight Chartered or as if Chartered" — Lump Chartered Freight—Loss not by Perils insured against—Cesser of Liability Clause—Loss of Bill of Lading Freight—Waiver of Lien for Chartered Freight.

Shipowners chartered a ship for a voyage at a lump freight, the charterers' liability to cease upon shipment of the cargo, provided the cargo was worth the freight, dead freight, and demurrage on arrival, and the vessel to have a lien on the cargo for the recovery of all freight, dead freight, demurrage, and all other charges. The shipowners and charterers jointly insured the lump freight "chartered or as if chartered valued" at the lump sum "on board or not on board." The charterers loaded the ship with a general cargo, and the master signed bills of lading by which the goods mentioned in each bill were made deliverable upon payment of the bill of lading freight payable in respect of those goods. The aggregate of the bill of lading freight exceeded the chartered freight. On the voyage part of the cargo was lost by jettison upon the ship running aground. The cargo which arrived was worth the freight, dead freight, and demurrage. Owing to the loss of cargo the bill of lading freight payable on the cargo delivered was less than the chartered freight. To recover the difference an action was brought on the policy by the shipowners and charterers jointly:—

Held, that the action was not maintainable, the loss having been caused not by perils of the seas, but by the master's not having reserved in the bills of lading the lien over the whole cargo for the chartered freight.

The decision of the Court of Appeal (reported as *Brankelow Steamship Co.* v. *Canton Insurance Office*, [1899] 2 Q. B. 178), affirmed.

BY a charterparty dated September 17, 1896, the Brankelow Steamship Company, Limited, chartered their steamship *Ramleh* to Williams & Co. for a voyage from Buenos Ayres to Liverpool at the lump sum of 3000*l.*, payable on the right and true delivery of the cargo in cash.

Clause 18 ran thus: "The master to apply at the offices of

charterers or their agents to sign bills of lading at any rate of freight the charterers or their agents may require, but not under chartered rates, or difference to be settled in cash on signing bills of lading. Charterers' liability to cease upon shipment of the cargo (provided said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge), but vessel to have a lien thereon for recovery of all freight, dead freight, demurrage, and all other charges whatsoever."

On November 11 brokers, acting on behalf of the owners and the charterers, and to cover the interests of both, effected a policy of insurance with the respondents for the voyage against perils of the seas. The policy was partly printed and partly written, and was expressed to be upon "any kind of goods," &c. . . . . "the said goods and merchandise, or treasure laden therein for so much as concerns the assured are and shall be rated and valued at 3000*l*. . . . . Freight chartered or as if chartered . . . . So valued . . . . on board or not on board." The rest of the policy was in the customary commercial jargon.

The charterers caused the *Ramleh* to be fully loaded by numerous shippers with a general cargo under the charter-party, such cargo being consigned to numerous different consignees, and the master signed bills of lading by which the goods mentioned in each bill were made deliverable to the consignee thereunder upon payment of the bill of lading freight in respect of those goods. The aggregate of the bill of lading freight on the goods shipped exceeded the amount of the chartered freight.

In the course of the voyage the *Ramleh* ran aground, and a portion of the cargo was lost by jettison, but the *Ramleh* subsequently arrived in Liverpool with the balance of her cargo, which was on arrival worth the freight, dead freight, and demurrage. Owing to this loss of cargo the bill of lading freight payable on the cargo delivered was less than the chartered freight by 614*l*. 0*s*. 4*d*. For this loss the charterers and the owners brought an action jointly against the respondents, claiming alternatively the sum of 614*l*. 0*s*. 4*d*. Bruce J., who tried the action, entered judgment for the defendants, and this

H. L. (E.) 1901

WILLIAMS & Co. v. CANTON INSURANCE OFFICE, LIMITED.

decision was affirmed by the Court of Appeal (A. L. Smith, Romer, and Vaughan Williams L.JJ.). (1)

April 25, 26. *Joseph Walton, K.C.*, and *Pickford, K.C.* (*Horridge, K.C.*, with them), for the appellants. The shipowners can maintain this action. They lost their chartered freight to the extent of 614*l.* 0*s.* 4*d.*; that loss was caused by perils of the seas; since the subject-matter of insurance was described as freight "chartered or as if chartered," the respondents knew the insurance had reference to some contract of affreightment; to ascertain what the freight insured was in case of loss the charterparty must necessarily be regarded, and being so regarded it appeared that the master was bound to sign separate bills of lading, and that a risk really insured against was that the lien for the lump freight on the goods as actually shipped might owing to perils of the sea become insufficient to realize the sum of 3000*l.* Thus, whatever the position created by the charterparty and bills of lading might be, the actual freight was to be treated as chartered. The effective cause of the loss of freight was the loss of cargo owing to perils of the sea. If the charterers were still liable for the balance of the chartered freight they would lose that balance by perils of the seas, because owing to those perils the cargo had been lost in respect of which they would otherwise have received the bill of lading freight to the same amount. Under the description "chartered or as if chartered" any bill of lading freight, or freight not actually chartered freight, was to be so treated. The policy and the charterparty must be read together: *Inman Steamship Co.* v. *Bischoff* (2); *The Alps* (3); and the respondents must be taken to have had notice of clause 18 as to bills of lading. The shipowner is entitled to his full freight of 3000*l.* The right to recover the balance needed to make up that amount from the respondents is not gone. But by the events which have happened, what the shipowner had was his lien on the bills of lading instead of the 3000*l.* If a cargo is loaded under bills of lading on which the freight amounts to

(1) [1899] 2 Q. B. 178. (2) (1882) 7 App. Cas. 670, 678.
(3) [1893] P. 109, 116.

3000*l.* and the cargo is sufficient to cover that amount, the charterer is no longer liable, and the shipowner has, instead of the charterer's freight, the bill of lading freight. But if the cargo and the bill of lading freight are insufficient, the charterer must make good the difference. Here the right of the shipowners against the insurers is not impaired: the right is not gone, though the means of enforcing it are restricted; and the owners have lost a right of action against the consignees. The loss thus incurred was "by perils of the sea." The underwriters insured against any loss under any charter. The owner was interested in the freight—he lost 614*l.* 0*s.* 4*d.*, and for this he had an insurable interest. The whole contract is not contained in the charterparty, but in that and the bills of lading construed together. As regards the appellants the charterers, if they are liable for the balance of the chartered freight they suffered a loss to that extent by reason of the loss of cargo by perils of the sea.

Carver, K.C., and *J. A. Hamilton, K.C.*, for the respondents, contended that the decision below was right for the reasons given, and put the dilemma referred to in Lord Davey's judgment. There was no loss of chartered freight, or if there was a partial loss it was due to there being no reservation of the charterparty lien in the bills of lading.

[They referred to *Hansen* v. *Harrold* (1); *Arrospe* v. *Barr* (2), in the Court of Session; *Bensaude* v. *Thames and Mersey Marine Insurance Co.* (3); *Turnbull, Martin & Co.* v. *Hull Underwriters' Association* (4); *Clink* v. *Radford* (5); *Barber* v. *Fleming*. (6)]

Joseph Walton, K.C., in reply. It is a forced use of language to treat the loss of the charterers' liability to pay as the shipowners' gain. In *Clink* v. *Radford* (5) the lien was only for demurrage, and the contract gave no damages for detention. There, as here, the cesser was coextensive with the lien. *Hansen* v. *Harrold* (1) is distinguishable, as the master had no alternative but to enforce the lien. It was not so here. This

(1) [1894] 1 Q. B. 612.
(2) (1881) 8 R. 603.
(3) [1897] A. C. 609.
(4) (1900) 5 Com. Cas. 248.
(5) [1891] 1 Q. B. 625.
(6) (1869) L. R. 5 Q. B. 59.

H. L. (E.) 1901 WILLIAMS & Co. v. CANTON INSURANCE OFFICE, LIMITED.

is rather like *Gardner* v. *Trechmann* (1), where it was held that the bill of lading did not incorporate the charterparty. Even if the shipowners cannot recover the charterers can, as the insurance was effected on the part of both. It is not necessary that there should be an insurable interest at the date of the policy, if there is an interest at the time of loss. The words "as if chartered" mean "chartered or other freight": *Barber* v. *Fleming*. (2) The one sum covers both a lump freight and a bill of lading freight not to exceed 3000*l*. All that was decided in *Inman Steamship Co.* v. *Bischoff* (3) is that, to ascertain whether there was a loss under the policy, the whole contract, charterparty, and policy must be looked at.

The House took time for consideration.

July 22. EARL OF HALSBURY L.C. My Lords, a vessel called the *Ramleh*, owned by the Brankelow Steamship Company, was chartered at a lump sum freight. The charter was for a voyage from the river Plate to Liverpool, and the freight by the charterparty was a lump sum of 3000*l*. A cesser clause provided that the charterers' liability was to cease upon shipment of the cargo, provided said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge, but vessel to have a lien thereon for recovery of freight, dead freight, demurrage, and all other charges whatsoever. It is not denied that the vessel arrived at her port of discharge, Liverpool, worth the freight due. A claim is now made under a policy of insurance which was effected with the Canton Insurance Company against perils of the sea upon freight chartered "or as if chartered."

These words "or as if chartered" have to my mind no meaning where there is, as in this case, a chartered freight, and if they have any meaning at all in other cases, of which I have some doubt, I decline to speculate what their meaning would be in a case different from the present. The chartered freight was earned so far as the charter itself was concerned,

(1) (1885) 15 Q. B. D. 154. (2) L. R. 5 Q. B. 59.
(3) 7 App. Cas. 670.

and if the whole chartered freight has not been realized it has not been by any perils of the sea that this has occurred. I am therefore very clearly of opinion that the judgment of the Court of Appeal is right and ought to be affirmed, and I move your Lordships accordingly.

LORD MACNAGHTEN. My Lords, I agree. I think the judgment of the Master of the Rolls is perfectly right. It seems to me to be clear that the insurance was upon the chartered freight. Whatever may be the meaning of the expression "freight chartered or as if chartered," the subject of the insurance was the lump sum freight valued at 3000*l.*—that and nothing else.

I also think that one of two things has happened. Either this freight has not been lost and the charterers are liable to pay the full sum, or the loss has occurred, not from perils of the sea, but in consequence of the form in which the bills of lading were taken.

It seems to me that it is not desirable to discuss the question whether the cesser clause in the charterparty became operative, because that question may possibly have to be determined between the shipowners and the charterers.

I am of opinion that the appeal must be dismissed with costs.

LORD DAVEY. My Lords, I am of the same opinion. I think that the subject of the insurance is what has been called chartered freight only, and it does not cover loss of the bills of lading freight. The charterers, therefore, cannot recover in this action. In the case of *The Bedouin* (1) Lord Esher held that the words "freight chartered $\frac{\text{and}}{\text{or}}$ as if chartered on board or not on board," which was the description of the risk insured in that case, was an elliptical expression for chartered freight or as if chartered on goods on board or not on board. "If there were any difficulty at all," he says, "in construing the words '$\frac{\text{and}}{\text{or}}$ as if chartered,' it seems to me that these words 'on board or not on board' do conclusively shew it must be

(1) [1894] P. 1.

H. L. (E.) 1901 WILLIAMS & CO. v. CANTON INSURANCE OFFICE, LIMITED. Lord Davey.

chartered freight, because if there is no charter or no contract equivalent to a charter there cannot be freight payable on goods not on board." This observation appears to me to be well founded. Your Lordships find similar words in the policy before you, and I am therefore of opinion that the subject of the insurance was chartered freight and nothing else.

But can the owners recover? The 18th clause of the charterparty is not very clearly expressed. But I think it was intended that the lien of the vessel for the chartered freight should extend to the whole of the cargo, and that an arrangement which conferred separate liens on the bills of lading freights payable on the several portions of the cargo, and therefore indirectly on those several portions only, was not a compliance with the contract. Otherwise I do not understand the meaning of the proviso that the "said cargo is worth the freight, dead freight, and demurrage on arrival at port of discharge." The proximate cause of the loss to the owners (if they have suffered any) is from their having parted with the liability of the charterers without securing to themselves the lien for which they stipulated in the charterparty. Whose fault was this? I think Mr. Carver succeeded in placing his opponent in a dilemma: either the master of the vessel deliberately or otherwise signed bills of lading in a form he was not bound to accept and without reserving the entire lien, in which case the owners have suffered a loss from the act of their agent which is not a risk insured against, or the master could not help himself and was obliged to sign the bills of lading which the charterers required him to sign, in which case the charterers remain liable if (as Mr. Carver contended) the words "but vessel to have a lien thereon," &c., are to be read as a condition precedent to the cesser of liability. Quite apart from the decision in *Hansen* v. *Harrold* (1), the words of the 18th clause rather favour this construction. For the cesser of liability is not to be definitive until arrival of the ship at the port of discharge, and the cargo being then worth the freight and demurrage. Reading the words in brackets with the subsequent words they may mean, provided the cargo is

(1) [1894] 1 Q. B. 612.

sufficient on arrival and the vessel has a lien thereon. Mr. Walton says that the case of *Hansen* v. *Harrold* (1) went too far and ought to be overruled. I certainly have no prejudice in favour of a decision to which I was party, and I am perfectly prepared to review it and, if necessary, to say it is wrong. But no such necessity exists in the present case, as I believe your Lordships agree with the Court of Appeal in holding that Mr. Walton is impaled on the first horn of Mr. Carver's dilemma.

LORD BRAMPTON (after stating the facts). My Lords, it must be taken as an admitted fact that the brokers, when effecting the policy, were acting on behalf of, and were making an insurance to cover, the interests of all the plaintiffs. But, of course, that is no admission that the charterers had in fact any such interest as would enable them to sue on the policy, nor can it extend the subject of the insurance beyond the language of the policy.

Upon such freights as might become due on the bills of lading the vessel had no doubt a lien, but it was not a lien upon the whole cargo for the lump freight as stipulated in the charterparty, but a lien limited to the amount due on each separate bill of lading, the aggregate of which then amounted to only 2385*l.* 19*s.* 8*d.*; that is to say, in other words, the cargo was worth over 3000*l.*, amply sufficient to cover all the lump freight; whereas the bills of lading freights, upon which alone the ship had a lien, amounted only to 2385*l.* 19*s.* 8*d.*, leaving a deficiency of 614*l.* 0*s.* 4*d.*, to recover which this action was brought.

The only question for the consideration of this House is whether that deficiency ought in law to be treated as a loss by perils of the sea.

In dealing with the subject of the insurer's liability under the policy, it must be assumed that it was made by the respondent insurance office, having regard to the terms of the charterparty: these could not fail to be important in determining the premium to be charged for the risk to be undertaken. In this case the

(1) [1894] 1 Q. B. 612.

H. L. (E.) 1901 WILLIAMS & Co. v. CANTON INSURANCE OFFICE, LIMITED. Lord Brampton.

sole subject-matter of insurance was the lump freight, and the sole undertaking was to indemnify the owner against loss by perils of the sea of any portion of it.

By this policy there was no insurance of the ship, nor of any of the goods forming the cargo, nor of any bills of lading freights, nor, so far as I can see, was it material to the insurers whether the cargo was shipped by the charterers themselves, for the carriage of which they were to pay the lump sum of 3000*l.* to the owners of the ship, or whether it was made up of numerous shipments by various shippers under bills of lading, so long as the owners had the personal responsibility of the charterers, unless and until the *Ramleh* arrived at Liverpool with a cargo worth the freight due, and on such arrival had a lien on all such cargo for all freight.

That the vessel did arrive with a cargo fully worth such freight is conceded, and if the stipulation as to the vessel's lien thereon as contained in the charterparty had remained available, her owners, the appellant company, would have had the satisfaction for the freight which it had stipulated for, and there would have been no loss at all of any part of it.

To what, then, is this deficiency or loss to be attributed? And how came it to pass that the lien as given by the charterparty was so limited as to be unavailable, except for the aggregate amount of the bills of lading freights? The true answers to these questions were given by Bruce J., by whom the case was tried without a jury, and by the Court of Appeal, consisting of the present Master of the Rolls (then A. L. Smith L.J.) and Romer and Vaughan Williams L.JJ. I adopt the language of A. L. Smith L.J., which very clearly states the position thus: "By whose act was it that the plaintiffs, the shipowners, had not a lien upon the cargo which arrived, for all the lump chartered freight, the cargo which arrived being ample to secure this? Surely that of the shipowners themselves, by not taking bills of lading with either the words 'freight and all other conditions as per charterparty' therein, or in some other form giving to themselves a lien over the whole cargo which arrived for the recovery of 'all freight' as mentioned in the cesser clause."

Suppose every part of the cargo actually shipped had been the sole property of the charterers, and had been loaded by them or their agents in strict accordance with the terms of the charterparty and without any bill of lading at all, that a loss to the same amount of the cargo had occurred by perils of the sea, but that the remainder of the cargo being still, notwithstanding that loss, worth, and amply sufficient to satisfy, the lump freight, had arrived safely at Liverpool and come to the hands of the owners: would it not have been a little against good sense to say that the lump freight, which, according to the intention of both owner and charterers, had been liquidated by means of the lien on the cargo which arrived, had been lost by perils of the sea? I am very much disposed to think that in using in the policy the words "freight chartered or as if chartered," it was intended by the framers of and the parties to it that whatever the facts might be, whether the ship was wholly loaded by the charterers or wholly or partly under bills of lading by other shippers, the whole was to be treated for the purposes of the policy as one entire undivided cargo, loaded by the charterers, to be carried for that one lump freight.

No doubt there was a loss of a substantial portion of the cargo by perils of the sea, and this occasioned to the owners of the goods a loss to that extent, and to the charterers a loss of their bills of lading freights. For these losses there may or there may not have been insurances by the persons concerned, but they certainly were not losses covered by this policy. The only contract made by the respondent insurers with the owners of the ship was to pay to them any loss occasioned by perils of the sea of the lump freight; but such loss could only happen in case of the arrival of the cargo so reduced by perils of the sea that its worth was less than that of the freight, dead freight, and demurrage. Such a contingency did not happen, and therefore the insurers are not liable, the loss (if any) which the owners have sustained being due, not to any insufficiency in the worth of the cargo which arrived, but because they and the charterers, by the bills of lading under which the cargo was shipped, had deprived the owners of the lien stipulated for in the charterparty, and limited it to the

H. L. (E.) 1901 WILLIAMS & Co. v. CANTON INSURANCE OFFICE, LIMITED.

amount of the freight due on the bills of lading, the aggregate of which was less, by the sum claimed, than the lump freight due.

For these reasons I think that this appeal should be dismissed with costs.

LORD LINDLEY. The words in the policy "chartered or as if chartered" have given rise to this litigation, and your Lordships will have to determine their real meaning and their effect when applied to the facts of this case.

The policy does not in terms refer to any particular charterparty, but there is a charterparty to which it has to be applied, and the provisions of which must be regarded: see *Inman Steamship Co.* v. *Bischoff*. (1) [His Lordship stated the effect of the charterparty.]

Your Lordships will observe that under this charterparty two freights might become payable. First there is the lump sum of 3000*l.* expressly mentioned in the charterparty, payable by the charterers to the owners, and for which the owners had a lien on the whole and every part of the cargo. There can be no doubt that the policy covered this freight, and that if it or any of it has been lost by perils of the sea the shipowners can recover the loss from the underwriters.

But your Lordships will also observe that in this lump sum chartered freight the charterers had no beneficial interest. They might have insured against their liability to pay it, but it is plain that the policy was not effected to cover, and does not cover, any such risk as that.

Then there might be (and in fact there was) the freight payable under bills of lading issued by the master pursuant to the 18th clause. This freight was very different from the lump sum chartered freight. The bills of lading freights were payable by the consignees of the cargo; their total was not one sum of 3000*l.*, but was the aggregate of the various sums payable in respect of the particular goods for which the bills of lading were respectively given; and, what is very important, there would be no lien on all the goods, for all the freight,

(1) 7 App. Cas. 670.

whether chartered or bill of lading, unless such lien was expressly given by each bill of lading signed by the master. This bill of lading freight further differed very materially from the lump sum chartered freight; for if goods were jettisoned in the course of the voyage (as in fact some were), the right to be paid the bill of lading freight in respect of those goods would be lost by perils of the sea, whilst the right to be paid the lump sum chartered freight in full would still remain. A lump sum freight is a definite sum agreed to be paid for the hire of a ship for a specified voyage; and although only payable on the right and true delivery of the cargo, those words are not taken literally, but are understood to mean right and true delivery, having regard to and excluding the excepted perils. In other words, the cargo, in this clause of the charterparty, does not mean the cargo shipped, but the cargo which the shipowner undertakes to deliver. The non-delivery of some of that affords no defence to a claim for the lump sum freight, although such non-delivery if wrongful will give rise to a cross-action. This was settled by the Court of Exchequer Chamber in *Merchant Shipping Co.* v. *Armitage* (1), which followed a decision to the same effect by the Privy Council in *The Norway*. (2) It follows that, if the bills of lading signed by the master had not been in such a form as to destroy the lien given by the charterparty for the lump sum freight on the whole cargo, such lien would have extended to the whole cargo ultimately landed; and if the value of the cargo landed had exceeded the lump sum freight, no part of such freight would have been lost by the shipowner, and he would have had no claim whatever against the underwriters in respect of it.

My Lords, both the shipowners and the charterers were beneficially interested in the bills of lading freights. They were a security to the shipowners for the lump sum chartered freight, and the surplus of the bills of lading freights belonged to the charterers. But the two freights cannot be regarded as practically the same. The risks run by insuring them are substantially different.

If the chartered freight had been a pro ratâ freight, i.e., so

(1) (1873) L. R. 9 Q. B. 99. (2) (1865) 3 Moo. P. C. (N.S.) 245.

H. L. (E.) 1901 WILLIAMS & CO. v. CANTON INSURANCE OFFICE, LIMITED. Lord Lindley.

much a ton, a partial loss of cargo would have involved a partial loss of freight, and it might have been indifferent to the underwriters under which document the freight was payable. But where, as in this case, the chartered freight is a lump sum and therefore payable in full, although some cargo is lost, a partial loss of cargo may not involve any loss of freight whatever. Indeed, as I have already pointed out, if as here there is a lien for the whole lump sum on the whole cargo, a partial loss of cargo can only affect the underwriters of a policy on the freight if the cargo landed is of less value than the lump sum. A partial loss of cargo will not affect them even then if the charterer is personally liable for the difference, for the underwriters do not insure his solvency. It is clear, then, that the risk of insuring a lump sum freight is very different from the risk of insuring freight of the same amount, but apportioned by bills of lading, and accordingly liable to partial loss in the event of a partial loss of cargo.

I proceed to state the circumstances under which the loss sought to be recovered in this action arose. A full cargo was shipped. The master issued bills of lading for goods mentioned in them, and by these bills of lading freight was made payable in respect of those goods on delivery, but no lien on those goods for any other freight was created or preserved. The lien given by the charterparty for the lump sum freight could not be exercised against the holders of the bills of lading; it was practically extinguished. Some goods were jettisoned on the voyage, and those goods, and the freights payable in respect of them under the bills of lading given for them, were lost, and were lost by perils of the sea. The ship, however, arrived at her destination safely with the rest of her cargo. The value of the cargo which arrived exceeded the lump sum chartered freight; so that the shipowners' lien for that freight could have been asserted if such lien had not been lost by the issue of bills of lading which did not refer to it.

My Lords, it is plain from this statement that the lump sum chartered freight has not been lost by any of the perils assured against. If the bills of lading had not been issued in such a form as to extinguish the lien for the lump sum chartered

freight, it would not have been lost at all; for even assuming that the charterers' personal liability for the lump sum freight had ceased under clause 18 of the charterparty, still the loss of some of the cargo by perils of the sea did not occasion the loss of the chartered freight or any part of it. The cargo which arrived was worth more than the amount of the chartered freight, and would have been an available security for it. Unless, therefore, the policy covers the bill of lading freights as well as the lump sum chartered freight, the plaintiffs' claim cannot be supported.

This brings me to the last question, which is, Do the words "freight chartered or as if chartered" cover or include the bills of lading freights, either together with or in substitution for the lump sum chartered freight?

My Lords, I cannot think they do. The term chartered freight is free from ambiguity, and means the freight, if any, made payable by the terms of the charterparty, i.e., in this case the lump sum of 3000*l*. The phrase "chartered or as if chartered" is alternative in form; if there is a chartered freight for certain goods or for a certain space in the ship, that is the freight insured, and no other freight for the same goods or space can be added to it or substituted for it if the underwriters' risk is altered. The alternative "or as if chartered" applies to freight, or what in business is treated as freight, although not made payable by the express terms of any charterparty—e.g., if the shipowner carries other people's goods without a charterparty, or perhaps if he carries his own goods. The phrase "as if chartered" would also cover freight payable under a charterparty entered into after the date of the policy, if the policy without those words would not extend to such freight.

Mr. Walton relied strongly on the fact that in this case the policy was admittedly entered into on behalf of both shipowners and charterers, and that the only freight the charterers had a beneficial interest in was the bills of lading freights. But the interests of the assured were not disclosed to the underwriters, who, so far as appears, knew nothing of the parties interested, and the fact that the charterers had no

H. L. (E.) 1901 WILLIAMS & Co. v. CANTON INSURANCE OFFICE, LIMITED. Lord Lindley.

beneficial interest in the chartered freight to which the policy plainly does apply cannot justify any Court in straining the language of the policy so as to include a different subject-matter involving a different risk.

My Lords, if in this case the words of the policy do not apply to the bills of lading freights, if those words must be confined to the lump sum chartered freight, there is an end of this case; for no part of that freight has been lost by perils of the sea, although, undoubtedly, some of it has been lost for other reasons.

It is unnecessary to consider whether, as Mr. Carver contended, the charterers are personally liable to the shipowners for this loss, on the ground that the shipowners had no effective lien on the cargo landed for the whole of the chartered freight; or whether, as Mr. Walton contended, the charterers are relieved from liability by the 18th clause of the charterparty properly construed, notwithstanding *Hansen* v. *Harrold* (1), on which Mr. Carver relied. I purposely, therefore, pass over that question.

The short but conclusive answer to the plaintiffs' claim is that the freight insured has not been lost by any of the perils insured against; and that the freight which has been lost by those perils is not the freight insured. This is the view taken by Bruce J. and by the Court of Appeal, and their decision ought to be affirmed with costs.

Lord Robertson has asked me to say that he concurs in your Lordships' decision.

EARL OF HALSBURY L.C. My Lords, Lord Shand desires me to say that he concurs in the judgment.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, July 22, 1901.

Solicitors: *Pritchard, Englefield & Co., for Simpson, North, Harley & Birkett, Liverpool; Waltons, Johnson, Bubb & Whatton.*

(1) [1894] 1 Q. B. 612.

[HOUSE OF LORDS.]

DOVEY AND THE METROPOLITAN BANK (OF ENGLAND AND WALES), LIMITED . . . . . APPELLANTS; (1)

AND

JOHN CORY . . . . . RESPONDENT.

H. L. (E.) 1901 Aug. 1.

Company—Director—Misfeasance—Payment of Dividends out of Capital—Banking Company—Advances on improper Security—Duty of Director—Negligence.

A director of a joint stock banking company in assenting to the payment of dividends out of capital and to advances on improper security honestly relied on the judgment, information, and advice of the chairman and general manager of the bank, by whose statements he was misled and whose integrity, skill, and competence he had no reason for suspecting:—

Held, that upon the true view of the facts he was not negligent of his duties as director and was not liable in the winding-up.

The decision of the Court of Appeal, *In re National Bank of Wales, Limited*, [1899] 2 Ch. 629, affirmed, their Lordships reserving their opinion upon the question of the payment of dividends out of capital discussed by the Court of Appeal, and Lord Davey expressing dissent from some of the propositions.

THE appellant as liquidator of the National Bank of Wales, Limited, in the voluntary winding-up took out a summons for a declaration that the respondent John Cory was guilty of misfeasance or breach of trust as a director in respect of (1.) dividends paid out of capital; (2.) improper advances to directors; (3.) improper advances to customers, and an order for repayment to the appellant of the losses thereby caused.

The facts are very fully and clearly stated in the report below (2), and are summarised in the judgments of Lord Halsbury L.C. and Lord Davey. Wright J. held that the last two heads of claim were not made out, but that dividends

(1) The Metropolitan Bank (of England and Wales), Limited, were originally respondents to this appeal, but were during the argument joined as co-appellants with their assent.

(2) [1899] 2 Ch. 629.

H. L. (E.) 1901 DOVEY v. CORY.

were paid out of capital and made an order for the repayment of certain sums of money. The Court of Appeal (Lindley M.R., Sir F. Jeune, and Romer L.J.) held that none of the claims were made out and reversed the decision of Wright J. on the first head. (1)

The liquidator appealed.

1900. Nov. 29, 30; Dec. 7, 10, 11. *Sir R. T. Reid, Q.C.*, and *Ingpen, Q.C.* (*S. T. Evans* with them), for the appellant Dovey. From 1884 to 1890 dividends were in effect paid out of capital. Such payment is a misfeasance for which under s. 10, sub-s. 1, of the Winding-up Act, 1890, "a past or present director" is made liable. The language is comprehensive and covers such negligence—bad banking and business imprudence—as Mr. Cory has been guilty of. A director must take reasonable care to see that the business is conducted properly and cannot shelter himself behind a manager. It is not necessary, to establish liability, that fraud should be charged and no imputation of dishonesty is made. Mr. Cory admitted that it was his duty to inspect the accounts, which were sufficiently alarming for some years before he retired from the board. There was a progressive diminution of capital, amounting in 1889 to more than 25,000*l.*; in 1890 to 43,000*l.*, and in 1891 to 50,000*l.* As far back as 1885 there were heavy losses in dishonoured bills. The number of so-called "dormant" accounts—of bad debts, of dishonoured bills—should have aroused the suspicion of every director. The balance-sheets—submitted to Mr. Cory and approved by him—were delusive. From each year's apparent income the bad debts of the previous year ought to have been deducted. This was not done, or done only to a very limited extent. Mr. Cory was guilty of "crassa negligentia" within the meaning of *Overend & Gurney Co.* v. *Gibb*. (2) Dividends were recklessly paid out of capital, and a director, though not strictly a trustee, is in a fiduciary position, and if he does not take reasonable care to avoid such an application of the capital he is responsible, and

(1) [1899] 2 Ch. 629.

(2) (1872) 5 H. L. 480.

want of knowledge where he might have known is no defence: *Bloxam* v. *Metropolitan Ry. Co.* (1) Where such payments have been made it is for the director to prove a certain standard of care. The burden lies on the director to shew that a dividend was fairly paid out of profits: *Rance's Case.* (2) An order for the repayment of dividends paid out of capital was made against the directors who made the payment in *Flitcroft's Case* (3), in *In re Oxford Benefit Building and Investment Society* (4), *Leeds Estate Building and Investment Co.* v. *Shepherd.* (5) Where the income of a company arises from the turning over of circulating capital no dividend can be paid unless that capital is kept up to its original value: *Verner* v. *General and Commercial Investment Trust* (6); *Wilmer* v. *McNamara & Co.* (7)

As a separate head of claim from the improper payment of dividends come the improper advances to directors and to customers. The credits given to directors were in contravention of art. 98 (E) of the articles of association. The lien constituted by art. 15 on directors' shares was not a security within art. 98 (E), nor was it so accepted by the directors. Directors must exercise the judgment of mercantile men, and no honest man could accept fees for doing work of which he had no knowledge. That directors, though not properly speaking trustees, "have always been considered and treated as trustees of money which comes to their hands or which is naturally under their control," is shewn in *In re Lands Allotment Co.* (8) It was there held that they are entitled to the benefit of the Trustee Act, 1888, and can take advantage of the Statute of Limitations. But culpa lata dolo aequiparatur; is equivalent, that is, to equitable fraud, and Mr. Cory cannot take advantage of the Act of 1888. The indiscriminate advances and overdrafts of which he must have known amount to such culpa lata.

[They also referred to *In re Ebbw Vale Steel, Iron, and Coal*

(1) (1868) L. R. 3 Ch. 337, 350.
(2) (1870) L. R. 6 Ch. 104.
(3) (1882) 21 Ch. D. 519.
(4) (1886) 35 Ch. D. 502.
(5) (1887) 36 Ch. D. 787.
(6) [1894] 2 Ch. 239.
(7) [1895] 2 Ch. 245.
(8) [1894] 1 Ch. 616, 631.

H. L. (E.) 1901 DOVEY v. CORY.

Co. (1), *Lee* v. *Neuchatel Asphalte Co.* (2), and *Lagunas Nitrate Co.* v. *Lagunas Syndicate.* (3)]

Sheldon, for the appellant, the Metropolitan Bank (of England and Wales), Limited.

Swinfen Eady, Q.C., and *G. F. Hart* (*Rufus Isaacs, Q.C.*, and *Nepean* with them), for the respondent, were only called upon with respect to payment of dividends out of capital. There is no question here of the claims of creditors. They have all been paid. The contributories are now asking that dividends which they have received should be paid over again on the ground that the former payment was improperly made out of capital and not income. Such a claim on the face of it cannot be maintained. It is settled by *Trevor* v. *Whitworth* (4) that no part of the fund which has been subscribed as capital can be returned to the shareholders. In so far as dividends have been paid out of capital there has been a transgression of the principle; but it has been in favour of the shareholders themselves, and though creditors might complain shareholders cannot. It would be impracticable to insist that every loss should be made good before a dividend was declared. If a company owned four steamers and one of them went to the bottom, could no profits arising out of the use of the remaining three be divided? There is no obligation to devote the net profits of one year to make up loss of capital incurred in a previous year. And a loss cannot be written off immediately on its being sustained. It is proper to wait till the end of the year when the accounts are made up. In *In re Barrow Hæmatite Steel Co.* (5), Cozens-Hardy J. points out that a company is entitled to pay dividends out of the profits from year to year notwithstanding loss of capital, and that there is no obligation to replace such capital. The payment of dividends out of capital is not in itself a fraud, and there has been nothing to shew wilful default. The accounts were audited by competent persons, and the respondent was entitled to rely upon them. It cannot be said that a director was guilty of

(1) (1877) 4 Ch. D. 827.
(2) (1889) 41 Ch. D. 1.
(3) [1899] 2 Ch. 392.
(4) (1887) 12 App. Cas. 409.
(5) [1900] 2 Ch. 846–55.

misfeasance in not recognising that at a particular time a particular debt was bad. To use the words of Cotton L.J. in *Flitcroft's Case* (1), the appellant is "suing for the purpose of paying over again to the shareholders what the shareholders have already received": that is the position to the extent to which, if any, dividends have been paid out of capital, and the attempt cannot succeed.

Ingpen, Q.C., replied.

The House took time for consideration.

Aug. 1. EARL OF HALSBURY L.C. My Lords, in this case the liquidator of the National Bank of Wales, Limited, appeals against a judgment of the Court of Appeal, whereby Mr. John Cory, the respondent, was discharged from the liability which Wright J.'s judgment had imposed upon him to pay 37,000*l.* for the benefit of the shareholders of the company, in respect of dividends already distributed, and a further sum for interest.

Mr. John Cory was a director of the company, and it is for his supposed misconduct in the management of the affairs of the company that this liability was imposed upon him. It is alleged and proved that certain losses have been sustained by the company, and the ground upon which Mr. John Cory is sought to be made liable is the very short and intelligible ground that he was a party to false and fraudulent statements as to the position of the company, and had had a share in causing those losses. The Court of Appeal have acquitted him of any knowledge of what was falsely stated, and Sir Robert Reid, in opening this appeal, stated to your Lordships that he did not intend, in arguing for Mr. John Cory's liability, to impute to him any moral obliquity. Now, there is no doubt that there were balance-sheets laid before meetings of the shareholders which, to use the language of the articles of association, were not proper and which did not truly report as to the state and condition of the company, and did not

(1) 21 Ch. D. at p. 536.

H. L. (E.) 1901 DOVEY v. CORY. Earl of Halsbury L.C.

comply with the requirements of the articles in question in respect of the particular sum which the directors recommended as dividend that it should be paid out of profits, but a greater sum was paid out as dividend than would have been paid if certain things had been taken into consideration, and therefore larger than should have been paid.

A great part of the judgment, both of Wright J. and of the Court of Appeal, is occupied by discussing matters which are not now before your Lordships as matters in debate. It is now admitted that Mr. John Cory ceased to be a director in December, 1890.

My Lords, I am very clearly of opinion that the judgment of the Court of Appeal is right and ought to be affirmed; but my opinion is entirely based upon the question of fact that he was guilty of no breach of duty whatever, and, for reasons which I will refer to hereafter, I am very anxious not to deal with some reasons given for their judgment by the Court of Appeal, which, in the view of the facts that I take, do not arise here; and in what I say I desire to be understood as only dealing with the facts of this particular case.

Now, in the first instance, I will assume that the company has sustained loss by the issue of fraudulent balance-sheets, by the improper advance of money to the customers of the bank, and that it has also sustained loss by the lending of money to directors without security. With respect to the default involving liability, if Mr. John Cory was conscious of the falsehood it is not necessary to go any further. Like any one else who is a party to a false statement acted upon to the prejudice of the person to whom it is made, he would be liable to the extent to which his falsehood has inflicted loss on his victims. But after the admission that has been made it is unnecessary to pursue this head of inquiry. He certainly could not be acquitted of moral obliquity if party to a fraudulent statement; but it is said he has so grossly neglected his duty as a director, that though he may not have known the true state of the facts, he ought to have known them, and his breach of duty in that respect renders him liable. In order to see how far this obligation is made out, it is necessary, to con-

sider what the business of the company was, and what was the position of Mr. John Cory in relation to it.

My Lords, I think it is idle to talk in general terms of the duty of a director to look after the concerns of the company of which he is one of the managers without seeing what in the ordinary course of business he ought to do or to have done. Now, there are some things which, of course, must be, or at all events ought to be, apparent to any one responsible for the conduct of a commercial business, and one may apply that observation to the business of which we are speaking, namely, a banking business; but I do not understand that any one has suggested that there was neglect or default by reason of the absence of some system under which, if honestly carried out, the interests of the bank would have been in that respect secured.

It is admitted that "the company's principal bank and its head office were at Cardiff, where the directors met and the general manager was in daily attendance. The company had also many branch banks, each with its own manager. The course of business was this: each branch manager sent weekly to the head office what is called a 'weekly state'—i.e., an account shewing how the assets and liabilities of the branch stood, what advances or overdrafts had been made or allowed, and to whom, what securities the bank held, and other matters. Every quarter each branch manager made a more formal return to the head office shewing the position of the branch and the business done during the past quarter. It was the duty of the general manager to examine these documents and to report to the board anything disclosed by them which required their attention. The weekly states or quarterly returns were in the board room for reference in case of need, but unless attention was called to them the directors did not think it necessary to examine them. The chairman of the directors was Mr. Thomas Cory, a brother of Mr. John Cory. The chairman and the general manager (Mr. Collins) visited each branch bank every year; and in addition, two skilled inspectors frequently went round and inspected the accounts and reported to the general manager. The accounts of the

H. L.(E.) 1901 DOVEY v. CORY. Earl of Halsbury L.C.

branch banks appear, however, not to have been separately audited by professional accountants. The auditors employed to examine the company's accounts, and to certify the annual balance-sheets and accounts laid before the shareholders, only saw the head office books, and the returns from the branch offices certified by their respective managers to the head office. These certified returns formed part of the weekly states, but *omitted* much that they contained. The minutes of the directors' meetings shew that, speaking generally, they attended with reasonable regularity and transacted a large amount of business. No director, unless it was the chairman, attended to any details not brought before the board either by the chairman or by the general manager. Mr. John Cory stated in his affidavit the general course of business at board meetings, and his cross-examination does not substantially differ from the account he there gives." (1)

But it is suggested that Mr. Cory is responsible because this and other portions of the system were not faithfully adhered to. And, indeed, what is really made the test of his responsibility is that he did not find out what was fraudulently withheld from his knowledge. So the warning letters of the auditor, which were never suffered to reach him, are suggested as warnings to him which he ought not to have neglected.

Again, the insufficient striking out of bad and doubtful debts, by which it is alleged that the amounts paid in dividends to himself and other directors, as well as shareholders, are by a process of reasoning and calculation assumed to be payments out of capital. These things are all assumed to have been done as though done with knowledge and intention, while at the same time the admission is made that there was no evil mind or conscious fraud.

Now I think such things, if done with evil mind and intention, would be fraud, and it comes back again to the proposition that the responsibility must be based upon the assumption that Mr. Cory is responsible because he did not find out the fraudulent knaves by whom he was surrounded. One was his own

(1) See statement taken from the judgment of the Court of Appeal, [1899] 2 Ch. 635–6, 664–5.

brother, another was the general manager; and once I arrive at the conclusion that there were those about him whose interest and object was to deceive him, I certainly do not think that the things which were designedly concealed from him are things which ought to be relied upon as matters for which he was responsible. In the view I take, the whole of the evidence which is relevant and important to the question, did Mr. Cory knowingly permit the things to be done which were done, becomes to my mind entirely immaterial if one is to start with the assumption that he knew nothing about them.

Dealing with the several heads of charge as they have been formulated in the judgment of Wright J., namely, negligence, breaches of trust in respect of advances made contrary to the said articles of association, and payment of dividends out of capital, I think each and all of them may be disposed of by the proposition that Mr. Cory was not himself conscious of any one of these things being done, and that unless he can be made responsible for not knowing these things, and, as Wright J. put it, he is shewn to have exhibited a complete neglect of the duties he had undertaken, the charges are not made out.

The charge of neglect appears to rest on the assertion that Mr. Cory, like the other directors, did not attend to any details of business not brought before them by the general manager or the chairman, and the argument raises a serious question as to the responsibility of all persons holding positions like that of directors, how far they are called upon to distrust and be on their guard against the possibility of fraud being committed by their subordinates of every degree. It is obvious if there is such a duty it must render anything like an intelligent devolution of labour impossible. Was Mr. Cory to turn himself into an auditor, a managing director, a chairman, and find out whether auditors, managing directors, and chairmen were all alike deceiving him? That the letters of the auditors were kept from him is clear. That he was assured that provision had been made for bad debts, and that he believed such assurances, is involved in the admission that he was guilty of no moral fraud; so that it comes to this, that he ought to have discovered a network of conspiracy and fraud by which he

H. L. (E.) 1901 DOVEY v. CORY. Earl of Halsbury L.C.

was surrounded, and found out that his own brother and the managing director (who have since been made criminally responsible for frauds connected with their respective offices) were inducing him to make representations as to the prospects of the concern and the dividends properly payable which have turned out to be improper and false. I cannot think that it can be expected of a director that he should be watching either the inferior officers of the bank or verifying the calculations of the auditors himself. The business of life could not go on if people could not trust those who are put into a position of trust for the express purpose of attending to details of management. If Mr. Cory was deceived by his own officers—and the theory of his being free from moral fraud assumes under the circumstances that he was—there appears to me to be no case against him at all. The provision made for bad debts, it is well said, was inadequate; but those who assured him that it was adequate were the very persons who were to attend to that part of the business; and so of the rest. If the state and condition of the bank were what was represented, then no one will say that the sum paid in dividends was excessive.

If I assume, as I do, that Mr. Cory acted upon representations made to him which he believed and which came from the officers of the bank, to whom he was, in my judgment, justified in giving credit, the discussion of whether the dividends actually paid were or were not properly divisible has no bearing on Mr. Cory's liability, and I am very reluctant to give any opinion upon it inasmuch as the question may arise, when it may be necessary to decide it. I deprecate any premature judgment.

My Lords, I am, as I have said, very reluctant to enter into a question which for the reasons I have given does not arise here, and into which the Court of Appeal has entered at some length. The only reason why I refer to it at all is lest by silence I should be supposed to adopt a course of reasoning as to which I am not satisfied that it is correct. I doubt very much whether such questions can ever be treated in the abstract at all. The mode and manner in which a business is carried on, and what is usual or the reverse, may have a considerable

influence in determining the question what may be treated as profits and what as capital. Even the distinction between fixed and floating capital, which may be appropriate enough in an abstract treatise like Adam Smith's "Wealth of Nations," may with reference to a concrete case be quite inappropriate.

It is easy to lay down as an abstract proposition that you must not pay dividends out of capital; but the application of that very plain proposition may raise questions of the utmost difficulty in their solution. I desire, as I have said, not to express any opinion, but as an illustration of what difficulties may arise the example given by the learned counsel of one ship being lost out of a considerable number, and the question whether all dividends must be stopped until the value of that lost ship is made good out of the further earnings of the company or partnership, is one which one would have to deal with. On the one hand, people put their money into a trading concern to give them an income, and the sudden stoppage of all dividends would send down the value of their shares to zero and possibly involve its ruin; on the other hand, companies cannot at their will and without the precautions enforced by the statute reduce their capital. But what are profits and what is capital may be a difficult and sometimes an almost impossible problem to solve. When the time comes that these questions come before us in a concrete case we must deal with them, but until they do I for one decline to express an opinion not called for by the particular facts before us, and I am the more averse to doing so, because I foresee that many matters will have to be considered by men of business which are not altogether familiar to a Court of Law.

I move that this judgment be affirmed, and this appeal dismissed with costs.

LORD MACNAGHTEN. My Lords, I have had an opportunity of reading in print the judgment of my noble and learned friend on the Woolsack, and I desire to express my concurrence in it, and at the same time to guard myself from being understood to assent to all the propositions supposed to have been laid down by the Court of Appeal in this case. I say no more,

H. L. (E.) 1901 DOVEY v. CORY. Lord Macnaghten.

because it seems to me that when Sir Robert Reid withdrew all charges involving moral obliquity against Mr. Cory the case was at an end. And I do not think it desirable for any tribunal to do that which Parliament has abstained from doing—that is, to formulate precise rules for the guidance or embarrassment of business men in the conduct of business affairs. There never has been, and I think there never will be, much difficulty in dealing with any particular case on its own facts and circumstances; and, speaking for myself, I rather doubt the wisdom of attempting to do more. I understand from my noble and learned friend Lord Shand that he also takes this view.

LORD DAVEY. My Lords, I agree with your Lordships in thinking that the appellant has not succeeded in making out a case for the relief which he asks against the respondent.

The appellant seeks to make the respondent liable under three heads: (1.) In respect of losses incurred by advances of money which he alleges that the respondent and the other directors of the bank negligently made to irresponsible persons, and without sufficient security. (2.) In respect of advances to the directors themselves, which he alleges were made contrary to the express provisions of the articles of association. (3.) In respect of sums paid to the shareholders (including the respondent himself) by way of dividend on their shares, which he alleges were paid out of the capital of the bank, and not out of profits. In fact, he alleges that there were no profits out of which such dividends could properly be paid, and that an apparent profit was created only by including as assets debts known to be bad and irrecoverable.

As regards the first two heads of claim, Wright J., as well as the Court of Appeal, has held that the claims cannot be sustained, and as I agree with the reasons which have been assigned for so holding, I need not trouble your Lordships by repeating them. As regards the third head of claim, the case as presented at your Lordships' bar has been very much narrowed by the admission of the appellant's counsel that the respondent ceased to be a director in December, 1890, and his

acceptance of the decision of the Court of Appeal that the Statute of Limitations applies so as to bar the recovery of any sums paid away prior to six years before the commencement of the proceedings. The claim is thus confined to the three dividends paid in July, 1889, December, 1889, and July, 1890.

My Lords, I think it appears from the evidence that, in the balance-sheets upon which these dividends were recommended by the directors, bad and irrecoverable debts were in fact included amongst the assets of the company, and that if those debts had been written off (as they ought to have been) the balance-sheet would not have shewn any profit out of which the dividends could have been paid. But before proceeding to discuss the evidence upon which it is sought to fix the respondent with responsibility, I will say a few words with regard to the law upon the subject with a view to ascertain exactly what it is the appellant must establish.

My Lords, I need only refer to three cases, which seem to me to contain the whole law upon the subject. In *Stringer's Case* (1) the business of the company in question was of an extremely speculative and hazardous character, and the directors had paid a dividend on their estimated value of assets which were afterwards totally lost. It was held that the estimate, having been made bonâ fide, and without any intention to defraud anybody, a director could not be made liable when the company was wound up to replace the money. In *Rance's Case* (2) Lord Romilly laid down the principle which he thought governed cases of this description thus: "When an improper payment has been made, if it be a mere error of judgment it cannot be recovered; if it be a fraudulent payment then it can." The learned judge explained what he meant by a fraudulent payment: "I mean one where the person who makes it or is concerned in making it is at the time aware of the impropriety of making it, but does so in order to obtain a benefit for himself"; and he adds: "The director may be ignorant of this fact, but if his ignorance arises from his

(1) (1869) L. R. 4 Ch. 475. (2) L. R. 6 Ch. 104.

H. L. (E.) 1901 DOVEY v. CORY. Lord Davey.

wilfully shutting his eyes to the facts which are before him, he is equally guilty." I think that this statement of the law is very nearly, but not quite, accurate. In my opinion it is not necessary that the motive of the improper payment should be to obtain a benefit for the director himself. I also understand Lord Romilly to include in the expression "wilfully shutting his eyes," culpable negligence or reckless indifference by the director in the performance of his duties. Lord Romilly decided that case in favour of the director. The Court of Appeal took a different view of the facts from that taken by Lord Romilly, and held that the directors in the preparation of the so-called balance-sheet had not followed the directions in their articles of association, and the balance-sheet did not in fact purport to shew a profit out of which a dividend could be paid. In such a case there can be no doubt of the liability of the director who took part in the payment of the dividend.

The case of *Leeds Estates, &c., Co.* v. *Shepherd* (1), before Stirling J., was a case of the same description. The directors had not followed the directions contained in the articles of association. The learned judge, in the course of his judgment, states the law thus: "It seems to me that the views expressed by the learned judges who decided *Rance's Case* (2) are consistent with the proposition that directors who are proved to have, in fact, paid a dividend out of capital fail to excuse themselves if they have not taken reasonable care to secure the preparation of estimates and statements of account, such as it was their duty to prepare and submit to the shareholders, and have declared the dividends complained of without having exercised thereon their judgment as mercantile men on the estimates and statements submitted to them."

My Lords, I agree in this statement of the law, and I do not think it inconsistent with that of Lord Romilly, properly understood, and subject to the observation which I have already made upon it. It is by this standard that the conduct of the respondent must be judged in this case.

The respondent, in his affidavit, states generally that he was,

(1) 36 Ch. D. 787. (2) L. R. 6 Ch. 104.

from first to last, under the honest and genuine belief that the affairs of the company were in a sound and solvent condition, and that its business was being carried on at a profit, and that its net profits for the time being were amply sufficient to justify the dividends which were from time to time, during his directorship, paid to the shareholders. And he adds that the general manager and branch managers were, so far as he knew, men of unquestioned competence and integrity, and that he and his co-directors were compelled by the magnitude of the business and the exigencies of the case generally to rely upon (and he did rely upon) these officials in all ordinary matters relating to the accounts of customers and other questions of detail. And he deals specifically with the various matters alleged in the liquidator's evidence on the same lines. The respondent was cross-examined on his affidavit at great, but not unnecessary, length. I am not, I think, doing injustice to the appellant's case when I say that reliance was chiefly placed on the "weekly states" and "quarterly returns" made by the branch managers, or that if he cannot succeed in fixing the respondent with liability on these documents, his case fails. These returns were laid on the table in the board room at each meeting of the directors. The comparative analysis of them, made by the skilled accountant who advises the appellant, does, I think, shew that certain accounts which were treated as good by the general manager in the preparation of the balance-sheets, submitted by him to the directors, were, in fact, irretrievably bad, and it is difficult to acquit the general manager of improper conduct in including them as assets. The respondent says in his affidavit that the "weekly states" consisted each week of a very large and voluminous pile of sheets, which it would have taken the directors a couple of days to go through, and that it was the duty of the general manager to go through the weekly states, with the letters of the branch managers accompanying them, and to place upon the agenda any points arising upon them which he considered ought to be brought to the attention of the directors; and upon the discussion of such points the documents were, when necessary, referred to; but, except in such cases, the weekly

H. L. (E.) 1901 DOVEY v. CORY. Lord Davey.

states were not consulted by the directors, but they relied on the general manager going carefully through them and drawing their attention to any matter requiring their consideration. On cross-examination he adhered to this statement. He added that the chairman also went through them often individually, and he did so for the board. He admitted that, before recommending a dividend, he did not look at all the accounts or look at the books themselves, but he said that the directors looked at the documents which were put before them by the manager—the amount which he considered was doubtful and bad—and they made a reserve for it. He also said that it was never brought before him that amounts due from bankrupt debtors were included in the balance-sheet of each year, and he never heard of any single case of that kind. It further appeared, from the evidence of other witnesses, that the branches of the bank were regularly visited and their books examined by the chairman and two inspectors.

In this state of the evidence, my Lords, I ask whether the course of business at the board meetings, as described by the respondent, was a reasonable course to be pursued by the respondent and other directors, or whether the knowledge which might have been derived from a careful and comparative examination of the weekly states and quarterly returns from the different branches of the bank ought to be imputed to the respondent, or (alternatively) whether he was guilty of such neglect of his duty as a director as would render him liable to damages. I do not think that it is made out that either of the two latter questions should be answered in the affirmative. I think the respondent was bound to give his attention to and exercise his judgment as a man of business on the matters which were brought before the board at the meetings which he attended, and it is not proved that he did not do so. But I think he was entitled to rely upon the judgment, information, and advice of the chairman and general manager, as to whose integrity, skill, and competence he had no reason for suspicion. I agree with what was said by Sir George Jessel in *Hallmark's Case* (1), and by Chitty J. in *In re Denham & Co.* (2), that

(1) (1878) 9 Ch. D. 329. (2) (1883) 25 Ch. D. 752.

directors are not bound to examine entries in the company's books. It was the duty of the general manager and (possibly) of the chairman to go carefully through the returns from the branches, and to bring before the board any matter requiring their consideration; but the respondent was not, in my opinion, guilty of negligence in not examining them for himself, notwithstanding that they were laid on the table of the board for reference. The case is no doubt one of some difficulty, but the appellant has not made out to my satisfaction that the respondent wilfully (as that term is explained in the cases I have referred to) misappropriated the company's funds in payment of dividends.

My Lords, what I have said is sufficient for the decision of this appeal. But I desire to express my dissent from some propositions of law which were laid down in the Court of Appeal, and upon which your Lordships thought it right to hear the respondent's counsel. The learned judges seem to have thought that a joint stock company, incorporated under the Companies Acts, may write off to capital losses incurred in previous years, and may in any subsequent year, if the receipts for that year exceed the outgoings, pay dividends out of such excess without making up the capital account. If this proposition be well founded, it appears to me that a company whose capital is not represented by available assets need never trouble itself to reduce its capital, with the leave of the Court and subject to the other conditions imposed by the Act of 1877, in order to enable itself to pay dividends out of current receipts.

My Lords, it may be that I have misapprehended the statement of law intended to be made by learned judges in the Court of Appeal. I think that is possible, because I find that in *Verner* v. *General and Commercial Investment Trust* (1) Lord Lindley says: "Perhaps the shortest way of expressing the distinction which I am endeavouring to explain is to say that fixed capital may be sunk and lost, and yet that the excess of current receipts over current payments may be divided, but

(1) [1894] 2 Ch. 239, at p. 266.

H. L. (E.) 1901 DOVEY v. CORY. Lord Davey.

that floating or circulating capital must be kept up, as otherwise it will enter into and form part of such excess, in which case to divide such excess without deducting the capital which forms part of it will be contrary to law."

I reserve my opinion as to the effect of an actual and ascertained loss of part of the company's fixed capital, as in the case put by Mr. Swinfen Eady of a loss of a ship uninsured. But, subject to this observation, I think that the statement of law contained in the passage I have quoted is not open to objection, and it is only because the learned judge appears to me to have departed from it in his judgment in the present case that I have troubled your Lordships with these remarks.

I agree that the appeal should be dismissed.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, August 1, 1901.

Solicitors: *Riddell & Co., for Thomas Williams, Neath; Burton, Yeates & Hart, for Johnsons, Barclay & Lowe, Birmingham; Michael Abrahams, Sons & Co.*

Applied. BRITISH MOTOR TRADE ASSN. v. SALVADORI. [1949] 1 Ch. 556

[HOUSE OF LORDS.]

QUINN . . . . . APPELLANT;

AND

LEATHEM . . . . . RESPONDENT.

H. L. (I.)
1901
Aug. 5.

Action, Cause of—Conspiracy—Inducing a Person to break his Contract or not to deal with Another or continue in his Employment — Intent to injure—Interference with Trade—Trade Union—Trade Dispute between Employers and Workmen—Conspiracy and Protection of Property Act, 1875, *c.* 86, *ss.* 3, 7.

Considered D. C. THOMSON LD. v. DEAKIN [1952] 1 Ch. 646

A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable.

The Conspiracy and Protection of Property Act, 1875, c. 86, s. 3, has nothing to do with civil remedies.

The words "trade dispute between employers and workmen" in s. 3 of that Act do not include a dispute on trade union matters between workmen who are members of a trade union and an employer of non-union workmen who refuses to employ members of a trade union.

Semble, the words are restricted to disputes between an employer and his own workmen.

Temperton v. *Russell*, [1893] 1 Q. B. 715, is not overruled as to the decision by *Allen* v. *Flood*, [1898] A. C. 1, but the dicta and reasoning of Lord Esher M.R. cannot be supported.

Allen v. *Flood* explained and its real effect stated.

The decision of the Irish Court of Appeal, *Leathem* v. *Craig*, [1899] 2 I. R. 667, affirmed.

THE respondent brought an action in Ireland against five defendants, Craig, Davey, Quinn (the appellant), Dornan and Shaw, alleging causes of action which are summarised in the judgment of Lord Brampton. At the trial before Fitz-Gibbon L.J. and a special jury at Belfast in July, 1896, evidence was given for the plaintiff to the following effect. Craig was president, Quinn treasurer, and Davey secretary of a trade union registered as the Belfast Journeymen Butchers and Assistants' Association. By rule 11 of the association it was the duty of all members to assist their fellow unionists to obtain employment in preference to non-society men.

H. L. (I.) 1901 QUINN v. LEATHEM.

The plaintiff, a flesher at Lisburn for more than twenty years, in July, 1895, was employing Dickie and other assistants who were not members of the union. At a meeting of the association at which Craig, Quinn, Dornan and Shaw were present, and which the plaintiff attended by Davey's invitation, the plaintiff offered to pay all fines, debts and demands against his men, and asked to have them admitted to the society. This was refused, and a resolution was passed that the plaintiff's assistants should be called out. Craig told the plaintiff that his meat would be stopped at Munce's if he did not comply with their wishes. Munce, a butcher, had been getting about 30*l.* worth weekly of meat from the plaintiff for twenty years.

The plaintiff in his evidence said: "For the last four years Munce has had an agreement with me to take my fine meat at so much a pound. He expected me to send it to him every week, and there was no week he did not get it. I had no written agreement with him. Whenever I killed I sent it, but I was not bound—only by word of mouth. It was only that if I sent it he would take it." What this meant did not clearly appear, but Munce's clerk who was called said, "Munce had no contract with the plaintiff: if he wanted his meat he could take it or reject it if he chose; it came weekly and was never refused. Neither was bound either to take or supply it."

In September Davey wrote to the plaintiff that if he continued to employ non-union labour the society would be obliged to adopt extreme measures. After some negotiations with Munce Davey wrote to him that having failed to make a satisfactory arrangement with the plaintiff, they had no other alternative but to instruct Munce's employees to cease work immediately the plaintiff's beef arrived. On September 20 Munce sent a telegram to the plaintiff, "Unless you arrange with society you need not send any beef this week as men are ordered to quit work," and Munce ceased to deal with the plaintiff. The plaintiff said that in consequence of this he was put to great loss, a quantity of fine meat having been killed for Munce.

Dickie, who had been ten years in the plaintiff's employ, was

called and said that he was employed by the week, that he was called out by the society, that he gave the plaintiff no notice when he left, that he left in the middle of the week, and that the plaintiff did not pay him for the broken week. There was no evidence of damage to the plaintiff, pecuniary or otherwise, caused by Dickie's breach of contract.

Evidence was given that "black lists" were issued by the society, containing (inter alia) the names of tradesmen who had dealings with the plaintiff, and one of whom was induced not to deal with him, but there was no evidence connecting Quinn with these lists.

The learned judge's notes of the evidence proceeded thus :—

At the close of the plaintiff's case "O'Shaughnessy, Q.C., asked for a non-suit or direction for the defendants on the grounds : 1st. That to sustain the action a contract made with Leathem must be proved to have been made and broken through the acts of the defendants, and that there was no evidence of such contract or breach. 2nd. That there was no evidence of pecuniary damage to the plaintiff through the acts of the defendants. 3rd. That the ends of the defendants and the means taken by them to promote those ends as appearing in evidence were legitimate, and there was no evidence of actual damage to the plaintiff.

"I declined to withdraw the case from the jury. O'Shaughnessy, Q.C., then stated that he called no evidence for the defendants. Chambers addressed the jury for the plaintiff. O'Shaughnessy, Q.C., replied for the defendants. I charged the jury, leaving them the following questions, to which I append their findings : 1. Did the defendants or any of them wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff?—Answer : Yes. 2. Did the defendants or any two or more of them maliciously conspire to induce the plaintiff's customers or servants named in the evidence or any of them not to deal with the plaintiffs or not to continue in his employment, and were such persons so induced not so to do? —Answer : Yes. 3. Did the defendants Davey, Dornan and Shaw, or any of them, publish the 'black list' with intent to

H. L. (I.) 1901 QUINN v. LEATHEM.

injure the plaintiff in his business, and if so did the publication so injure him?—Answer: Yes.

"The jury found for the plaintiff, with 250*l.* damages, of which 50*l.* was for damages on the cause of action relating to the 'black lists,' and 200*l.* was for damages on the other causes of action. I directed the jury that there was no evidence against the defendants Craig and Quinn upon the cause of action relating to the 'black lists,' and I directed them to assess the damages (if any) on that cause of action separately. On the above findings, on the application of Serjeant Dodd, I gave judgment for the plaintiff upon the other causes of action against all the defendants, with 200*l.* damages, and against the defendants Davey, Dornan and Shaw upon the cause of action relating to the 'black lists' for the further sum of 50*l.* damages.

"At the conclusion of my charge, O'Shaughnessy, Q.C., for the defendants, made the following objections and requisitions:—

"1. That I had given the jury no definition of damage, and he asked me to define damage as 'actual loss.'

"I told the jury that pecuniary loss, directly caused by the conduct of the defendants, must be proved in order to establish a cause of action, and I advised them to require to be satisfied that such loss to a substantial amount had been proved by the plaintiff. I declined to tell them that if actual and substantial pecuniary loss was proved to have been directly caused to the plaintiff by the wrongful acts of the defendants, they were bound to limit the amount of damages to the precise sum so proved. I told them that if the plaintiff gave the proof of actual and substantial loss necessary to maintain the action, they were at liberty in assessing damages to take all the circumstances of the case, including the conduct of the defendants, reasonably into account.

"2. That I had told the jury that the liability of the defendants depended on a question of law, and that as the defendants could not give their testimony as to their own intentions, observations which I had made upon their non-production amounted to misdirection.

"I did not tell the jury that the liability of the defendants depended on any question of law. I told them that the questions left to them were questions of fact to be determined on the evidence, but that they included questions as to the intent of the defendants, and, in particular, their intent to injure the plaintiff in his trade as distinguished from the intent of legitimately advancing their own interests. I did not tell the jury that the defendants could be directly asked what their own intention was, but I did tell them that their intention was to be inferred from their acts and conduct as proved, and that in acting upon the evidence given by the plaintiff they were at liberty to have regard to the fact that the defendants, who might have given the best evidence on the subject, had not been produced to explain, qualify or contradict any of the evidence given for the plaintiff as to their overt acts.

"3. That the cause of action relating to the 'black list' was separate and should be separately left to the jury.

"I acceded to this objection, and directed the jury that there was not sufficient evidence to connect the defendants Craig and Quinn with the publication of the 'black lists.' As against the other three defendants, I told the jury that their acts in relation to the 'black lists' might be considered upon the issues relating to their intent and conduct generally.

"4. That there was no question to go to the jury because no actual injury had been proved, as there was no evidence that any binding contract with the plaintiff had been broken through the action of the defendants, and there was no evidence of any money loss.

"Having told the jury that the proof of actual pecuniary loss directly caused to the plaintiff by the wrongful acts of the defendants must be established by the plaintiff as the foundation of the action, I declined to withdraw the case from them, having regard especially on the question of breach of a binding contract to the withdrawal of Dickie from the plaintiff's employment, and generally to the evidence as to the pecuniary loss on the sale of meat prepared for Munce, to the loss of his

H. L. (I.) 1901 QUINN v. LEATHEM.

custom, and to the threat to withdraw his men if the plaintiff's meat arrived and was received at his shop. I advised the jury not to find for the plaintiff unless satisfied that he had sustained actual money loss in his business to a substantial amount. Upon the meaning of the words 'wrongfully and maliciously' in the questions, I told the jury that they had to consider whether the intent and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him, as distinguished from acts legitimately done to secure or advance their own interests. As to the 'black lists,' I told the jury that their publication would be actionable if done, without justification, for the purpose and with the effect of injuring the plaintiff in his business, by holding him up to unpopularity or disfavour with or by intimidating those who would otherwise have dealt with him. Finally, I told the jury that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, whether employers or employed, by reasonable and legitimate means, were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, I told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade. Whether the acts of the defendants were or were not in that sense actionable was the question which I told the jury they had to try upon the evidence. At

the conclusion of my charge, at the request of O'Shaughnessy, Q.C., for the defendants, I divided this single question into the written questions which I submitted to the jury as above stated.

"I approved of the verdict. The amount of damages was larger than I might myself have given, if it were within my province to assess damages. But I cannot say that any excess which there may be in the mere amount of damages is either so great, or having regard to the circumstances of the defendants and of the case, so material as to justify me in expressing disapproval of the verdict upon that ground alone."

The learned judge gave judgment for the plaintiff for 200*l.* on the first and second causes of action against all the defendants, and for the further sum of 50*l.* damages on the third cause of action against the defendants Davey, Dornan, and Shaw only, with costs.

A motion was made "to set aside the verdict and judgment and enter a verdict for the defendants, or, in the alternative, for a new trial on the ground of misdirection of the learned judge in refusing to direct for the defendants; leaving to the jury the case as against all the defendants on the evidence; and in that on the evidence no actionable wrong was shewn; in that he refused to direct for the defendants in the absence of evidence of damage fit to be submitted to a jury; and on the further ground that the learned judge misdirected the jury in that he refused to tell the jury their findings of damages was confined to damages shewn in the evidence, and, in the alternative, for a new trial on the ground that the damages were excessive and out of all proportion to the amount suggested in evidence, and that the learned judge further allowed the jury to take into account on the question of liability and damages a certain paper in the case called the "black list," and upon other grounds." This motion was refused with costs by the Divisional Court (Andrews J., O'Brien J., and Sir P. O'Brien C.J., Palles C.B. dissenting).

In the Irish Court of Appeal (Lord Ashbourne L.C., Porter M.R., Walker and Holmes L.JJ.) the decision below was affirmed with costs, the judgment for the plaintiff being

H. L. (I.) 1901 QUINN v. LEATHEM.

amended by omitting the part as to the recovery of 50*l.* damages. (1) Quinn alone brought the present appeal.

May 14, 17, 20; June 11, 13. *W. Martin McGrath* and *Vesey Knox*, for the appellant. To justify the verdict and judgment for the plaintiff it must be shewn that there was a violation of a legal right: some conduct which would have been actionable whatever the motive, and without conspiracy or combination. An act which is not in itself actionable does not become so because the motive is malicious or bad: *Allen* v. *Flood* (2), nor because it is done in combination by two or more, or by the conspiracy of several, unless the conspiracy be criminal. There is no question of criminality here. These latter propositions are not decided by *Allen* v. *Flood* (2), for they were left open in the judgments, but they follow from the reasoning in that case and are the natural sequence of previous decisions. The learned judge who tried the case misdirected the jury on all these points: confusing "malice" with a wrongful act; treating an intention to injure as turning an innocent act into a tortious one; and a combination between two or more as having the same effect. None of the acts complained of were in themselves tortious. The most plausible argument for the plaintiff was that it is actionable to induce a man to break a contract; but *Lumley* v. *Gye* (3) has been doubted, is unsound in principle, and can be overruled here. It may be actionable to induce the commission of a tort, but it is a long step from a tort to a breach of contract, and Lord Coleridge C.J., following Coleridge J. in *Lumley* v. *Gye* (3), held in *Bowen* v. *Hall* (4) that an action does not lie for maliciously and injuriously procuring another to break a contract where the relation of master and servant in the strict sense does not exist. In the present case there was no evidence of a contract between the plaintiff and Munce: the plaintiff's own evidence is confused and self-contradictory, and the only rational conclusion is to adopt the evidence of Munce's clerk that there was no contract,

(1) *Leathem* v. *Craig*, [1899] 2 I. R. 667.
(2) [1898] A. C. 1.
(3) (1853) 2 E. & B. 216.
(4) (1881) 6 Q. B. D. 342.

the plaintiff not being bound to send the meat, and Munce not being bound to take it. As to the case of the plaintiff's assistant, Dickie, there was no evidence of damage to the plaintiff, and without damage no action will lie. There is no reason for extending the right of action beyond the right to sue the man who broke the contract.

With regard to inducing persons not to make contracts or deal with the plaintiff, or continue in his employment, the law is settled by the *Mogul Case*. (1) No matter whether the effect or the intention be to injure another, it is lawful to do these things in order to secure a monopoly, or benefit oneself, and in the absence of criminality what is lawful in one is not unlawful in several. To promote the interests of a trade union is as legitimate as to struggle for the monopoly of a particular business. There was here no threat of violence, obstruction, intimidation, or nuisance, nothing but the advancement of trade unionism by lawful means. This view was taken by Darling J. in *Huttley* v. *Simmons* (2), and see the judgment of Holmes J., who dissented, in *Vegelahn* v. *Guntner*. (3) Concerted action to injure another, if no legal right is infringed, is not forbidden by law: *Cotterell* v. *Jones*. (4) There was no actual decision in *Gregory* v. *Duke of Brunswick* (5) that a combination to hiss an actor was illegal.

[LORD HALSBURY L.C. I think there was. See the report in 6 Scott, N. R. 809.]

The point does not seem to have been actually decided. The defendant's plea of justification on the grounds of obscene libels and blackmailing by the plaintiff was disallowed and leave was given to amend: but there was no amendment. The decision was therefore naught. The summing-up is reported 1 C. & K. 31. It is an old fallacy to argue that though one man may legally injure another, the same act in several combined is illegal because several can do more mischief than one. It is not true: some men are a host in their individual

(1) [1892] A. C. 25.
(2) [1898] 1 Q. B. 181.
(3) (1896) 167 Mass. 92.
(4) (1851) 11 C. B. 713.
(5) (1843–4) 6 M. & G. 205, 953.

H. L. (I.) 1901 QUINN v. LEATHEM.

selves: are lions; some multitudes are asses: e.g. Napoleon: Bismarck: and the nations whom they crushed.

The Conspiracy and Protection of Property Act, 1875, c. 86, applies to the present case. These were acts done in combination by several persons in contemplation or furtherance of "a trade dispute" between employers and workmen. The Act expressly protects such acts from indictment and by implication from civil liability.

None of the acts complained of being wrongful, judgment should be entered for the appellant, and failing that, there should be a new trial, there being several misdirections, and the jury having given damages in respect of acts which are admittedly not actionable. The damages also are in any view excessive.

Haldane, K.C., and *Francis Watt*, for the respondent. A conspiracy has been defined as a combination (1.) to do an illegal act by legal means; (2.) or an illegal act by illegal means; or (3.) a legal act by illegal means. The conduct of the appellant comes within one or more of these categories. But, apart from conspiracy, the appellant's acts were in themselves unlawful. They were acts of molestation—intimidation—oppression. These are described by Bowen L.J. in the *Mogul Case* (1) as being forbidden, and his language was approved on the appeal to this House. They were not acts done by an individual workman in pursuit of his own interest; and there was no such lawful excuse as in the *Mogul Case* (2) and in *Allen* v. *Flood*. (3) Threats by an individual to boycott, or in other words to injure or even ruin, are unlawful apart from combination. But there was also a conspiracy to do these things. The essential difference—in addition to the element of conspiracy—between this case and *Allen* v. *Flood* (3) is that there the act complained of was lawful—here unlawful. An actionable conspiracy is constituted where two or more combine for an unlawful purpose, even if no overt act is committed. This case is precisely similar to *Temperton* v. *Russell*. (4) That case was held by Wright J. (5) not to be applicable to *Allen* v.

(1) (1889) 23 Q. B. D. at p. 614.
(2) [1892] A. C. 25.
(3) [1898] A. C. 1.
(4) [1893] 1 Q. B. 715, 730.
(5) [1898] A. C. 64.

Flood (1): see also Mathew J. (2) That may be, but this case is of the character of nuisance, riot, disturbance, unlawful assembly: *Clifford* v. *Brandon* (3); *Rex* v. *Eccles* (4); *Walsby* v. *Anley* (5); *Lyons* v. *Wilkins*. (6) The acts done were indictable as a nuisance, and punishable as a misdemeanour. There are many American cases on boycotting, based on English decisions: see *Crump* v. *Commonwealth* (7): "The power of many for mischief against the one is so great that the State should protect the one." In *Boutwell* v. *Marr* (8) it was held that a conspiracy to boycott was unlawful, and that a man has no right to divert business custom from another. Coercion or intimidation of employers or customers is prohibited: *Beck* v. *Railway Teamsters' Protective Union* (9); *Delz* v. *Winfree*. (10) There was no "trade dispute" here, and s. 3 of the Act of 1875 affords no protection to the appellant. *Lyons* v. *Wilkins* (6) shews that the operation of the section is limited to cases between an employer and his own workmen. A conspiracy to prevent a man's making his living by working at his trade is unlawful: *Rex* v. *Eccles* (4): and see the judgment, which collects the cases, of Phillimore J. in *Boots* v. *Grundy*. (11)

[They also referred to *Benton* v. *Pratt* (12), *Rice* v. *Manley* (13), and *Green* v. *Bulton*. (14)]

M'Grath, in reply, referred to *Scottish Co-operative Society* v. *Glasgow Fleshers' Association*. (15)

The House took time for consideration.

Aug. 5. EARL OF HALSBURY L.C. My Lords, in this case the plaintiff has by a properly framed statement of claim complained of the defendants, and proved to the satisfaction of a jury that the defendants have wrongfully and maliciously induced

(1) [1898] A. C. 1.
(2) [1898] A. C. at p. 25.
(3) (1810) 2 Camp. 358; 11 R. R. 731.
(4) (1783) 1 Lea. C. C. 274.
(5) (1861) 3 E. & E. 516.
(6) [1899] 1 Ch. 255.
(7) (1888) 10 Amer. St. R. 903.
(8) (1899) 76 Amer. St. R. 746.
(9) (1898) 74 Amer. St. R. 421.
(10) (1891) 26 Amer. St. R. 755.
(11) (1900) 82 L. T. 769; 48 W. R. 638.
(12) (1829) 2 Wend. 385.
(13) (1876) 66 N. Y. (21 Sichels) 82.
(14) (1835) 2 C. M. & R. 707; 41 R. R. 818.
(15) (1898) 35 Sc. L. R. 645.

H. L. (I.) 1901 QUINN v. LEATHEM. Earl of Halsbury L.C.

customers and servants to cease to deal with the plaintiff, that the defendants did this in pursuance of a conspiracy framed among them, that in pursuance of the same conspiracy they induced servants of the plaintiff not to continue in the plaintiff's employment, and that all this was done with malice in order to injure the plaintiff, and that it did injure the plaintiff. If upon these facts so found the plaintiff could have no remedy against those who had thus injured him, it could hardly be said that our jurisprudence was that of a civilized community, nor indeed do I understand that any one has doubted that, before the decision in *Allen* v. *Flood* (1) in this House, such fact would have established a cause of action against the defendants. Now, before discussing the case of *Allen* v. *Flood* (1) and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides. I entirely deny that it can be quoted for a proposition that may seem to follow logically from it. Such a mode of reasoning assumes that the law is necessarily a logical code, whereas every lawyer must acknowledge that the law is not always logical at all. My Lords, I think the application of these two propositions renders the decision of the case of *Allen* v. *Flood* (1) perfectly plain, notwithstanding the decision of the case of *Allen* v. *Flood*.

Now, the hypothesis of fact upon which *Allen* v. *Flood* (1) was decided by a majority in this House was that the defendant there neither uttered nor carried into effect any threat at all: he simply warned the plaintiff's employers of what the men themselves, without his persuasion or influence, had determined to do, and it was certainly proved that no resolution of the trade union had been arrived at at all, and that the trade union official had no authority himself to call out the men,

(1) [1898] A. C. 1.

which in that case was argued to be the threat which coerced the employers to discharge the plaintiff. It was further an element in the decision that there was no case of conspiracy or even combination. What was alleged to be done was only the independent and single action of the defendant, actuated in what he did by the desire to express his own views in favour of his fellow members. It is true that I personally did not believe that was the true view of the facts, but, as I have said, we must look at the hypothesis of fact upon which the case was decided by the majority of those who took part in the decision. My Lords, in my view what has been said already is enough to decide this case without going further into the facts of *Allen* v. *Flood* (1); but I cannot forbear accepting with cordiality the statement of them prepared by two of your Lordships, Lord Brampton and Lord Lindley, with so much care and precision.

Now, in this case it cannot be denied that if the verdict stands there was conspiracy, threats, and threats carried into execution, so that loss of business and interference with the plaintiff's legal rights are abundantly proved, and I do not understand the very learned judge who dissented to have doubted any one of these propositions, but his view was grounded on the belief that *Allen* v. *Flood* (1) had altered the law in these respects, and made that lawful which would have clearly been actionable before the decision of that case. My Lords, for the reasons I have given I cannot agree with that conclusion. I do not deny that if some of the observations made in that case were to be pushed to their logical conclusion it would be very difficult to resist the Chief Baron's inflexible logic; but, with all the respect which any view of that learned judge is entitled to command and which I unfeignedly entertain, I cannot concur. This case is distinguished in its facts from those which were the essentially important facts in *Allen* v. *Flood*. (1) Rightly or wrongly, the theory upon which judgment was pronounced in that case is one whereby the present is shewn to be one which the majority of your Lordships would have held to be a case of actionable injury inflicted without any excuse whatever.

(1) [1898] A. C. 1.

H. L. (I.)
1901
QUINN
v.
LEATHEM.
Earl of Halsbury L.C.

My Lords, there was a subordinate question raised which I must not pass over. It is suggested that FitzGibbon L.J. did not put all the questions which were necessary to raise all the points which the learned counsel desired to argue. Now, I think the charge of the Lord Justice was absolutely accurate, and when, in deference to the wishes of the learned counsel for the defendant himself, he consented to put such questions as were then desired, it would be intolerable that it should afterwards be made the subject of complaint that he did not at the same time put other questions which he was not asked to put at all.

My Lords, for these reasons I am of opinion that there is no difficulty whatever in this case, and I move that this appeal be dismissed with costs.

LORD MACNAGHTEN. (1) My Lords, notwithstanding the strong language of the late O'Brien J. and the arguments of the Lord Chief Baron, I cannot help thinking that the case of *Allen* v. *Flood* (2) has very little to do with the question now under consideration. In my opinion, *Allen* v. *Flood* (2) laid down no new law. It simply brushed aside certain dicta which in the opinion of the majority of this House were contrary to principle and unsupported by authority. Those dicta are first to be found in the judgment delivered by Lord Esher on behalf of himself and Lord Selborne in *Bowen* v. *Hall.* (3) They were repeated by Lord Esher and Lopes L.J. in *Temperton* v. *Russell* (4); but they were not, I think, necessary for the decision in either case. They did form the ground of decision in *Allen* v. *Flood* (2) in its earlier stages. But in the end the law was restored to the condition in which it was before Lord Esher's views in *Bowen* v. *Hall* (3) and *Temperton* v. *Russell* (4) were accepted by the Court of Appeal. The head-note to *Allen* v. *Flood* (2) might well have run in words used by Parke B. in giving the judgment of an exceptionally strong Court, nearly half a century ago (*Stevenson* v. *Newnham* (5)—"*an act which does*

(1) Read by Lord Brampton in Lord Macnaghten's absence.
(2) [1898] A. C. 1.
(3) 6 Q. B. D. 333.
(4) [1893] 1 Q. B. 715.
(5) (1853) 13 C. B. 297.

not amount to a legal injury cannot be actionable because it is done with a bad intent." That, in my opinion, is the sum and substance of *Allen* v. *Flood* (1) if you eliminate all matters of merely passing interest—the charge of the learned judge, the findings of the jury (unintelligible, I think, without a careful examination of the evidence), and the discussion of the evidence itself in the two different aspects in which it was presented—once for the consideration of this House, and again for the consideration of the learned judges by whom the House was assisted.

The case really brought under review on this appeal is *Temperton* v. *Russell*. (2) I cannot distinguish that case from the present. The facts are in substance identical: the grounds of decision must be the same. Now, the decision in *Temperton* v. *Russell* (2) was not overruled in *Allen* v. *Flood* (1), nor is the authority of *Temperton* v. *Russell* (2), in my opinion, shaken in the least by the decision in *Allen* v. *Flood*. (1) Disembarrassed of the expressions which Lord Esher unfortunately used, the judgment in *Temperton* v. *Russell* (2) seems to me to stand on surer ground. So far from being impugned in *Allen* v. *Flood* (1) it had, I think, the approval of Lord Watson, whose opinion seems to me to represent the views of the majority better far than any other single judgment delivered in the case. Lord Watson says (3) that he did not think it necessary to notice at length *Temperton* v. *Russell* (2), because it was to his mind "very doubtful whether in that case there was any question before the Court with regard to the effect of the animus of the actor in making that unlawful which would otherwise have been lawful." Then he goes on to say: "The only findings of the jury which the Court had to consider were—(1.) that the defendants had maliciously induced certain persons to break their contracts with the plaintiffs, and (2.) that the defendants had maliciously conspired to induce and had thereby induced certain persons not to make contracts with the plaintiffs. There having been undisputed breaches of contract by the persons found to have

(1) [1898] A. C. 1. (2) [1893] 1 Q. B. 715.
(3) [1898] A. C. 108.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Macnaghten.

been induced, the first of these findings raised the same question which had been disposed of in *Lumley* v. *Gye*. (1) According to the second finding the persons induced merely refused to make contracts, which was not a legal wrong on their part, but the defendants who induced were found to have accomplished their object to the injury of the plaintiffs by means of unlawful conspiracy—a clear ground of liability according to *Lumley* v. *Gye* (1) if, as the Court held, there was evidence to prove it." It must be admitted, I think, that the second reference to *Lumley* v. *Gye* (1) in the passage I have just quoted is a slip—a rare occurrence in a judgment of Lord Watson's. But I do not think that the slip (if it be a slip) impairs the effect of what Lord Watson said. Obviously Lord Watson was convinced in his own mind that a conspiracy to injure might give rise to civil liability even though the end were brought about by conduct and acts which by themselves and apart from the element of combination or concerted action could not be regarded as a legal wrong.

Precisely the same questions arise in this case as arose in *Temperton* v. *Russell*. (2) The answers, I think, must depend on precisely the same considerations. Was *Lumley* v. *Gye* (1) rightly decided? I think it was. *Lumley* v. *Gye* (1) was much considered in *Allen* v. *Flood*. (3) But as it was not directly in question, some of your Lordships thought it better to suspend their judgment. In this case the question arises directly, and it is necessary to express an opinion on the point. Speaking for myself, I have no hesitation in saying that I think the decision was right, not on the ground of malicious intention—that was not, I think, the gist of the action—but on the ground that a violation of legal right committed knowingly is a cause of action, and that it is a violation of legal right to interfere with contractual relations recognised by law if there be no sufficient justification for the interference.

The only other question is this: Does a conspiracy to injure, resulting in damage, give rise to civil liability? It seems to me that there is authority for that proposition, and that it

(1) 2 E. & B. 216. (2) [1893] 1 Q. B. 715.
(3) [1898] A. C. 1.

is founded in good sense. *Gregory* v. *Duke of Brunswick* (1) is one authority, and there are others. There are valuable observations on the subject in Erle J.'s charge to the jury in *Duffield's Case* (2) and *Rowland's Case.* (3) Those were cases of trade union outrages; but the observations to which I refer are not confined to cases depending on exploded doctrines in regard to restraint of trade. There are also weighty observations to be found in the charge delivered by Lord FitzGerald, then FitzGerald J., in *Reg.* v. *Parnell and Others.* (4) That a conspiracy to injure—an oppressive combination—differs widely from an invasion of civil rights by a single individual cannot be doubted. I agree in substance with the remarks of Bowen L.J. and Lords Bramwell and Hannen in the *Mogul Case.* (5) A man may resist without much difficulty the wrongful act of an individual. He would probably have at least the moral support of his friends and neighbours; but it is a very different thing (as Lord FitzGerald observes) when one man has to defend himself against many combined to do him wrong.

I have only to add that I agree generally with the judgments delivered in the Courts below, and particularly with the judgment of Andrews J. in the Queen's Bench, and the judgment of Holmes L.J. in the Court of Appeal. I do not think that the acts done by the defendants were done "in contemplation or furtherance of a trade dispute between employers and workmen." So far as I can see, there was no trade dispute at all. Leathem had no difference with his men. They had no quarrel with him. For his part he was quite willing that all his men should join the union. He offered to pay their fines and entrance moneys. What he objected to was a cruel punishment proposed to be inflicted on some of his men for not having joined the union sooner. There was certainly no trade dispute in the case of Munce. But the defendants conspired to do harm to Munce in order to compel him to do harm to Leathem, and so enable them to wreak their

(1) 6 M. & G. 205, 953.
(2) (1851) 5 Cox C. C. 404.
(3) (1851) 5 Cox C. C. 436.
(4) (1881) 14 Cox C. C. 508.
(5) 23 Q. B. D. 598; [1892] A. C. 25.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Macnaghten.

vengeance on Leathem's servants who were not members of the union.

I also think that the provision in the Conspiracy and Protection of Property Act, 1875, which says that in certain cases an agreement or combination is not to be "indictable as a conspiracy," has nothing to do with civil remedies.

LORD SHAND. (1) My Lords, after the able and full opinions of the learned judges of the Court of Appeal in Ireland holding that the verdict and judgment for the plaintiff ought to stand, the grounds of my opinion that the judgment ought to be affirmed and the appeal dismissed may be shortly stated. I refrain from any detailed reference to the numerous cases cited in the argument. These have been considered and discussed by the judges of the Court of Appeal, and I concur in the reasoning of the majority of their Lordships, and they have been already dealt with in my judgment in the case of *Allen* v. *Flood*. (2)

In that case I expressed my opinion that while combination of different persons in pursuit of a trade object was lawful, although resulting in such injury to others as may be caused by legitimate competition in labour, yet that combination for no such object, but in pursuit merely of a malicious purpose to injure another, would be clearly unlawful; and, having considered the arguments in this case, my opinion has only been confirmed.

The learned judge before whom the case was tried, with reference to the words "wrongfully and maliciously" in the first question, told the jury that the questions to be answered by them were matters of fact only to be determined on the evidence, and in particular involved the question whether the intention of the defendants was to injure the plaintiff in his trade, as distinguished from the intention of legitimately advancing their own interests. The verdict affirms that this was the fact, for after the direction of the learned judge no other interpretation can be given to the finding that the acts

(1) Read by Lord Davey in Lord Shand's absence.
(2) [1898] A. C. 1.

complained of were done by the defendants "wrongfully and maliciously."

This being clearly so, the question now raised is really whether, in consequence of the decision of this House in the case of *Allen* v. *Flood* (1), and of the grounds on which that case was decided, it is now the law that where the acts complained of are in pursuance of a combination or conspiracy to injure or ruin another, and not to advance the parties' own trade interests, and injury has resulted, no action will lie, or, to put the question in a popular form, whether the decision in *Allen* v. *Flood* (1) has made boycotting lawful.

Apart from the decision in that case, the judgment of the learned judges in Ireland would have been unanimous in affirming the principle to which FitzGibbon L.J. gave effect. The general law cannot, I think, be more happily stated than in the passage from the judgment of Lord Bowen in the *Mogul Case* (2), which was quoted by the Lord Chancellor with an expression of his strong approval in the case of *Allen* v. *Flood*. (3) [His Lordship read the passage.] The Lord Chancellor also spoke with approval, as I should certainly do, of the views to a similar effect stated by Sir William Erle in his work on Trade Unions.

It may be true that in certain cases the object of inflicting injury, and success in that object, requires combination or conspiracy with others in order to be effectual. That was not so in all of the cases enumerated by Lord Bowen; but no question on that point arises in the circumstances of this particular case, for according to the evidence and the verdict of the jury the defendants by combined action wrongfully and maliciously induced a number of persons to refrain from dealing with the plaintiff. That is sufficient for the decision of the case, although, in my opinion, it is further proved that they succeeded in inducing a servant and a customer of the plaintiff to break existing contracts with him. On the whole, it seems to me clear that the defendants were guilty of unlawful acts, unless the judgment in the case of *Allen* v. *Flood* (1)

(1) [1898] A. C. 1. (2) 23 Q. B. D. 614.
(3) [1898] A. C. at p. 74.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Shand.

has introduced a change which has rendered such acts lawful.

As to the vital distinction between *Allen* v. *Flood* (1) and the present case, it may be stated in a single sentence. In *Allen* v. *Flood* (1) the purpose of the defendant was by the acts complained of to promote his own trade interest, which it was held he was entitled to do, although injurious to his competitors, whereas in the present case, while it is clear there was combination, the purpose of the defendants was "to injure the plaintiff in his trade as distinguished from the intention of legitimately advancing their own interests." It is unnecessary to quote from the judgments of the majority of the learned judges in *Allen* v. *Flood* (1) to shew their opinions on the importance of this essential point. Lord Herschell, for example, said (2): "The object which the defendant and those whom he represented had in view throughout was what they believed to be the interest of the class to which they belonged; the step taken was a means to that end." And the other noble and learned Lords in the majority expressed themselves to a similar effect. For myself, what I said was this (3): "If anything is clear on the evidence, it seems to me to be this, that the defendant was bent, and bent exclusively, on the object of furthering the interests of those he represented in all he did; that this was his motive of action, and not a desire, to use the words of the learned judge, 'to do mischief to the plaintiffs in their lawful calling.' The case was one of competition in labour, which, in my opinion, is in all essentials analogous to competition in trade, and to which the same principles must apply."

The ground of judgment of the majority of the House, however varied in expression by their Lordships, was, as it appears to me, that Allen in what he said and did was only exercising the right of himself and his fellow workmen as competitors in the labour market, and the effect of injury thus caused to others from such competition, which was legitimate, was not a legal wrong.

(1) [1898] A. C. 1. (2) [1898] A. C. at p. 132.
(3) [1898] A. C. at p. 163.

It is only necessary to add that the defendants here have no such defence as legitimate trade competition. Their acts were wrongful and malicious in the sense found by the jury—that is to say, they acted by conspiracy, not for any purpose of advancing their own interests as workmen, but for the sole purpose of injuring the plaintiff in his trade. I am of opinion that the law prohibits such acts as unjustifiable and illegal; that by so acting the defendants were guilty of a clear violation of the rights of the plaintiff, with the result of causing serious injury to him, and that the case of *Allen* v. *Flood* (1), as a case of legitimate competition in the labour market, is essentially different, and gives no ground for the defendant's argument.

I concur with your Lordships in holding that there is not sufficient ground for disturbing the verdict on the question of damages, and in holding that the special provision of the 3rd section of the Conspiracy Act of 1875 has no application to the circumstances of this case.

LORD BRAMPTON. My Lords, this case now awaiting your Lordships' final judgment is one which, looked at simply as affecting the parties to it, is of no serious pecuniary concern; but it involves, nevertheless, questions of widespread importance to every trader and to every employer and servant engaged in trade.

It is an action originally brought in the High Court in Ireland by Henry Leathem, the respondent, as plaintiff, against Joseph Quinn (the sole appellant) and four other persons, named respectively John Craig (now dead), John Davey, Henry Dornan, and Robert Shaw, as defendants, to recover damages for a wrongful interference with the plaintiff's business of a butcher at Lisburn, a few miles from Belfast. For upwards of twenty years before July, 1895, Leathem had carried on business in Lisburn, having as one of his constant customers Andrew Munce (now also dead), who kept a butcher's shop at Belfast, to whom he supplied weekly twenty or thirty pounds' worth of the best meat; and he had in his employ as assistants several men at weekly wages.

(1) [1898] A. C. 1.

H. L. (I.)
1901
QUINN
v.
LEATHEM.
Lord Brampton.

In February, 1893, a trade union society was registered under the Trade Union Acts, 1871 and 1876, by the name of "The Belfast Journeymen Butchers and Assistants' Association." Of this society Craig was president, Quinn treasurer, and Davey secretary; they were original members; the other defendants, Dornan and Shaw, joined subsequently as mere ordinary members. Leathem was not a member, nor were any of his assistants. The members of the society amongst themselves soon adopted an unregistered rule that they would not work with non-union men, nor would they cut up meat that came from a place where non-union hands were employed; but there was no evidence that, prior to July, 1895, this had been productive of any conflict between Leathem's men and the union.

Early in that month, however, Leathem, on the invitation of Davey, attended a meeting of the society held at Lisburn. All the defendants were there. The occurrences at this meeting shewed the existence of an angry feeling, and an overbearing determination on the part of the defendants to compel Leathem to employ none but union men, which culminated in the lawless conduct the subject of this action.

Leathem had at that time among his assistants a man named Robert Dickie, a family man, with young children dependent upon him; this man had been in his employ for ten years. He was desirous of keeping him and all the others employed by him in his service, but still of doing anything in reason to conciliate the society. But I had better let him tell his account of this meeting in his own words, as he told it to the jury. "I said that I came on behalf of my men, and was ready to pay all fines, debts, and demands against them; and I asked to have them admitted to the society. The defendant Shaw got up and objected to their being allowed to work on, and to their admission, and said that my men should be put out of my employment, and could not be admitted, and should walk the streets for twelve months. I said it was a hard case to make a man walk the streets with nine small children, and I would not submit to it. Shaw moved a resolution that my assistants should be called out; a man named Morgan seconded

the resolution, and it was carried. Craig was in the chair; I was sitting beside him. He said there were some others there that would suit me as well. He picked some out and said they could work for me. I said they were not suitable for my business, and I would keep the men I had. They said I had to take them. I said I would not put out my men. Craig then spoke, and told me my meat would be stopped in Andrew Munce's if I would not comply with their wishes."

The chairman spoke truly; for on September 6 the secretary of the society wrote to Leathem, asking "whether he had made up his mind to continue to employ non-union labour," adding, "If you continue as at present, our society will be obliged to adopt extreme measures in your case." He wrote also to Mr. Munce on September 13, stating that a deputation had been appointed to wait upon him to come to a decision in regard to his purchase of meat from Leathem & Sons, as they were anxious to have a settlement at once. To this letter Mr. Munce sent, on September 14, a very sensible reply: "It is quite out of my province to interfere with the liberty of any man. But why refer to me in the matter? I do not think it fair for you to come at me, seeing it appears to be the Messrs. Leathem that you wish to interfere with." A deputation, which included Craig, Quinn, Shaw, and Dornan, had an interview with a son of Mr. A. Munce, and on September 17 he wrote to the secretary the reply of his father, "that he could not interfere to bring pressure to bear on Mr. Leathem to employ none but society men by refusing to purchase meat from him, as that would be outside his province and interfering with the liberty of another man." The 18th of September brought a definite announcement from the secretary to Mr. Munce that, having failed to make a satisfactory arrangement with Mr. Leathem, they had no other alternative but to instruct his (Munce's) employees "to cease work immediately Leathem's beef arrives." Thereupon Mr. Munce was constrained to send to Leathem on September 20 a telegram: "Unless you arrange with society you need not send any beef this week, as men are ordered to quit work." On and

H. L. (I.) 1901

QUINN v. LEATHEM.

Lord Brampton.

from that day Munce took no more meat from Leathem, to his substantial loss.

Another mode adopted by several of the defendants with a view to prevent persons dealing with Leathem was the publication throughout the district of Lisburn of "black lists" containing and holding up to odium, not only his name, but the names of persons who dealt with him, as a warning to those persons that if they wished their names to be removed from the lists they must have no more dealings with him or any other non-society shops. Amongst others, a man named McBride, a customer of Leathem, was operated on by this mode, and ceased to deal with him; attempts were also made by means of such lists to influence two other men named Davis and Hastings. With the object of further inconveniencing Leathem in his trade, two of his weekly servants, Rice and McDonnell, who had been non-union men, were somehow or other induced to join the society and to quit their service with Leathem. It is true they gave due notice of their intention to do so, and as regards them, therefore, no separate cause of action could be maintained. But it is significant that after they had left their service they were paid by the society during the time they were out of work weekly sums of money as compensation for the wages they would have earned with Leathem. As regards the assistant, Robert Dickie, he left his service without any notice in the middle of a week, and so wrongfully broke his contract with his employers, and there was an abundance of evidence that he was induced to do that wrongful act through the unjustifiable influence of the defendants, for Dickie's evidence at the trial was that he was brought out of Leathem's shop by Rice to a meeting of the society in a room over the defendant Dornan's shop; that Shaw (another defendant) was there; that they wanted him to leave Leathem because the rest were out, and promised to pay him what he had from Leathem; that he left, and was paid by Rice for the society and was then in Dornan's service.

The case came on for trial at the Belfast Assizes in July, 1896, before FitzGibbon L.J. and a special jury. The pleadings charged in the first four counts, as separate causes of

action, (1.) the procuring Munce to break contracts he had made with Leathem; (2.) the publication by the defendants of "black lists"; (3.) the intimidation of Munce and other persons to break their contracts; and (4.) the coercion of Dickie and other servants to leave the service of the plaintiff. Each of these counts alleged that the acts complained of were done "wrongfully and maliciously, and with intent to injure the plaintiff, and to have occasioned him actual loss, injury, and damage." The fifth and last count charged, also as a separate cause of action, that the defendants unlawfully and maliciously conspired together, and with others, to do the various acts complained of in the previous counts, with intent to injure the plaintiff and his trade and business, and that by reason of the conspiracy he was injured and damaged in his trade. Damages and an injunction were claimed.

The evidence adduced I have already set forth substantially. At the conclusion of it Mr. O'Shaughnessy, Q.C., for the defendants, submitted that they were entitled to a nonsuit upon the grounds that there was no evidence of a contract between Munce and Leathem, nor of any pecuniary damage to the plaintiff by reason of the acts of the defendants, and that the acts of the defendants were legitimate. The learned Lord Justice refused to nonsuit, and I think he rightly refused. For there was clearly evidence for the consideration of the jury upon one or more of (I think upon all) the causes of action. I need not discuss that point further, for it was practically disposed of during the argument before this House.

No evidence was called for the defendants. I regret that no shorthand note of the summing-up of the Lord Justice was furnished to your Lordships. We have, however, a copy of the learned judge's own notes and memoranda. From a careful perusal of these I am satisfied that every indulgence that could have been reasonably given to the learned counsel in presenting his case to the jury was allowed him, and I am satisfied that he must be taken to have acquiesced in the form in which the questions submitted for the consideration of the jury were left to them, even though it might otherwise have been open to criticism.

H. L. (I.)
1901
QUINN
v.
LEATHEM.
Lord Brampton.

After commenting upon the evidence relied upon by the plaintiff as proof of actionable misconduct, he told the jury that they had to consider whether the interests and actions of the defendants went beyond the limits which would not be actionable, namely, securing or advancing their own interests or those of their trade by reasonable means, including lawful combination, or whether their acts, as proved, were intended and calculated to injure the plaintiff in his trade through a combination and with a common purpose to prevent the free action of his customers and servants in dealing with him, and with the effect of actually injuring him as distinguished from acts legitimately done to secure or advance their own interests; that acts done with the object of increasing the profits or raising the wages of any combination of persons, such as the society to which the defendants belonged, by reasonable and legitimate means were perfectly lawful, and were not actionable so long as no wrongful act was maliciously—that is to say, intentionally—done to injure a third party. To constitute such a wrongful act for the purposes of this case, he told the jury that they must be satisfied that there had been a conspiracy, a common intention and a combination on the part of the defendants, to injure the plaintiff in his business, and that acts must be proved to have been done by the defendants in furtherance of that intention which had inflicted actual money loss upon the plaintiff in his trade. And having so told the jury, he proposed to put to them as the question they had to try upon the evidence, Whether the acts of the defendants were or were not in that sense actionable?

I have thought it right, as near as possible, to follow the language of the Lord Justice, for that charge was delivered before *Allen* v. *Flood* (1) was decided in this House. In substance I think it was correct, having regard to the case before him. In some respects it seems to me that it was a little too favourable to the defendants, but even had it been otherwise it was uttered in the presence of the defendants' counsel, who desired and was allowed then and there to make such objections as he thought fit to it. He made four only: first, that

(1) [1898] A. C. 1.

the judge had given no definition of damage; second, that he had told the jury that the liability of the defendants depended on a question of law. These two questions were to my mind conclusively answered in the summing-up: see p. 33 of Appendix.

A third objection was that the question relating to the black list should be separately left to the jury. It was then so left, and as to that the judge directed them that there was not sufficient evidence to connect Quinn and Craig with the black lists. By this I take it he meant not as an independent cause of action, there being, in fact, no evidence of Quinn's personal participation in the publication of those lists. But that left him still affected by them as overt acts of the conspiracy, for each of which every one of the conspirators is liable, and the evidence touching the black lists was beyond all question admissible under the conspiracy count.

The fourth objection was that there was no evidence of any binding contract having been broken through the action of the defendants; but the judge then again declined to withdraw that question of contract from the jury, and I think he was right in so refusing at that stage of the trial; and at a later stage, after the whole matter had been disposed of under the conspiracy count, he rightly refrained from putting the question at all, because it had become unnecessary. At the request of the learned counsel, however, he divided the single general question he at first proposed into the three separate questions—(1.) Did the defendants, or any of them, wrongfully and maliciously induce the customers or servants of the plaintiff named in the evidence to refuse to deal with the plaintiff? (2.) Did the defendants, or any two or more of them, maliciously conspire to induce the plaintiff's customers or servants named in the evidence, or any of them, not to deal with the plaintiff or not to continue in his employment, and were such persons so induced not to do so? (3.) Did the defendants Davey, Dornan, and Shaw, or any of them, publish the "black list" with intent to injure the plaintiff in his business, and, if so, did the publication so injure him? The jury answered each of these questions in the affirmative, and assessed the damages

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Brampton.

against all the defendants at 200*l.*; and with regard to the third question, they found against the defendants Dornan, Davey, and Shaw, with an additional 50*l.* as damages against them only. Judgment was given in accordance with that verdict.

If, my Lords, before that judgment was given the counsel for either party had felt it of importance that the specific issues raised upon each count should be determined by the jury, the learned judge would, no doubt, have applied himself to attain that object; but when, as it oftentimes happens in the course of a trial, it is obvious to everybody concerned in it that the case may conveniently be determined by the answer of the jury to one general comprehensive question involving the whole of the material matters at issue, and all parties either expressly or tacitly acquiesce in that view, and such question is accordingly put to and answered by the jury, neither party can afterwards hark back to the original issues raised by the pleader on the record long before it was possible for him to know how the case can best be dealt with when the evidence is all disclosed. Here the real substantial question was whether there had existed between all or any two or more of the defendants an unlawful conspiracy to injure the plaintiff in his trade, and, if so, whether the plaintiff had been specially injured thereby, all the wrongful acts charged in the previous counts being treated as overt acts of such conspiracy. To support that conspiracy count it was not essential that every overt act alleged should be proved, but only a sufficient number of them to support the count. The issues on that count having been found by the jury, and damages assessed in favour of the plaintiff, the separate issues became immaterial, since they had already been treated as incorporated for all purposes of the action in it. I note, in confirmation of this, that the Lord Justice pointedly told the jury that proof of a conspiracy was essential to the support of the action.

In substance, this finding of the jury amounted to a general verdict against all the defendants, except on the issue relating to the black lists, with 200*l.* damages, and as to that issue against Davey, Dornan, and Shaw only, with separate and further damages, 50*l.*

Rightly understood, I think the judgment in *Allen* v. *Flood* (1) is harmless to the present case. But I need hardly say that, in order properly to understand and appreciate it, it is essential to ascertain what were the material facts assumed to exist by their Lordships who assented to that judgment, and what were the principles of law applied by them to those facts. This necessity will be more apparent when it is realized that unanimity of opinion as to the facts certainly did not prevail, that the judges who were called upon to render their assistance to the House were requested to answer this one simple question only, namely, "Assuming the evidence given by the plaintiffs' witnesses to be correct, was there any evidence of a cause of action fit to be left to the jury?" This evidence was only to be found in the Appendix handed to each of the judges as containing the evidence referred to, and to that evidence the judges naturally applied themselves, and upon it their opinions were formed. That evidence of the plaintiffs' witnesses most certainly did not altogether coincide with some very material facts assumed by their Lordships; this will account for variance in the views expressed as to the legal rights and alleged wrongful acts of the parties. It would be an endless task to endeavour to reconcile all these differences of fact and opinion; I will not, therefore, make the attempt.

Some of this confusion arose no doubt from the course taken, rightly or wrongly, at the trial, when all questions of conspiracy, intimidation, coercion, or breach of contract were withdrawn from the jury, the only matters of fact found by them being that Allen maliciously induced the Glengall Company to discharge Flood and Taylor from their employment, and not to engage them again, and that each plaintiff had suffered 20*l.* damages.

I collect from the case, as reported, that it was assumed by their Lordships that the Glengall Company were under no contractual obligation to retain the plaintiffs Flood and Taylor in their service for any duration of time, but might dismiss them from their employment at any moment it was their will so to do, and that the boiler-makers were working under the

(1) [1898] A. C. 1.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Brampton.

same conditions; that Allen in making the communication which induced the Glengall Company to dismiss the plaintiffs was doing only that which he had a legal right to do, and they held, therefore, that the plaintiffs had no legal cause of action against either the Glengall Company or the defendant, and that the mere fact as found by the jury that the defendant was actuated by a malicious motive could not convert a rightful into a wrongful act.

This latter proposition, that the exercise of an absolutely legal right cannot be treated as wrongful and actionable merely because a malicious intention prompted such exercise, was established as clear law by this House in *Bradford Corporation* v. *Pickles* (1), and it is now too late to dispute it, even if one were disposed to do so, which I am not. It must not, however, be supposed that a malicious intention can in no case be material to the maintenance of an action. It is commonly used to defeat the defence of privilege to do or to say that which without privilege would be wrongful and actionable.

Take the familiar instance of an action for malicious prosecution. It is not a wrongful act for any person who honestly believes that he has reasonable and probable cause, though he has it not in fact, to put the criminal law in motion against another; but if to the absence of such reasonable and probable cause a malicious motive operating upon the mind of such prosecutor is added, that which would have been a rightful (in the sense of a justifiable) act if done without malice becomes with malice wrongful and actionable. What would constitute such malice it is not material for the purposes of this case to define. Of course, if when he instituted criminal proceedings the prosecutor knew he had no reasonable ground for the steps he was taking, the definition of malice given by Bayley J. in *Bromage* v. *Prosser* (2) would distinctly apply, and no further proof of malice would be required; but if he really believed he had such reasonable cause, although in fact he had it not, and was actuated not by such belief alone, but also by personal spite or a desire to bring about the imprisonment of or other harm to the accused, or to accomplish some other sinister object

(1) [1895] A. C. 587. (2) 4 B. & C. 247; 28 R. R. 241.

of his own, that personal enmity or sinister motive would be quite sufficient to establish the malice required by law to complete a cause of action—that is, if such malice was found as a fact by the jury.

In this case the alleged cause of action is very different from that in *Allen* v. *Flood*. (1) It is not dependent upon coercion to break any particular contract or contracts, though such causes of action are introduced into the claim; but the real and substantial cause of action is an unlawful conspiracy to molest the plaintiff, a trader in carrying on his business, and by so doing to invade his undoubted right, thus described by Alderson B. in delivering the judgment of the Exchequer Chamber in *Hilton* v. *Eckersley* (2): "Primâ facie it is the privilege of a trader in a free country in all matters not contrary to law to regulate his own mode of carrying it on according to his own discretion and choice. If the law has in any matter regulated or restrained his mode of doing this, the law must be obeyed. But no power short of the general law ought to restrain his free discretion."

To this I would add the emphatic expression of the Lord Chancellor, Lord Halsbury, in the *Mogul Case* (3): "All are free to trade upon what terms they will"; and of Lord Bramwell, who in *Reg.* v. *Druitt* (4), in a passage quoted by Lord Halsbury in the same case (5), said: "The liberty of a man's mind and will to say how he should bestow himself and his means, his talents and his industry, was as much a subject of the law's protection as was that of his body." Again, Sir W. Erle thus expresses himself: "Every person has a right under the law as between himself and his fellow-subjects to full freedom in disposing of his own labour or his own capital according to his will. It follows that every other person is subject to the correlative duty arising therefrom, and is prohibited from any obstruction to the fullest exercise of this right which can be made compatible with the exercise of similar rights by others." (6) I am not aware that the rights thus stated have

(1) [1898] A. C. 1.
(2) 6 E. & B. 74.
(3) [1892] A. C. 38.
(4) 10 Cox C. C. 600.
(5) [1892] A. C. at p. 73.
(6) Erle on Trade Unions, p. 12.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Brampton.

ever been seriously questioned. I rest my judgment upon the principle expressed in these few sentences. I seek for no more.

The remedy for the invasion of a legal right is thus stated by Lord Watson in his judgment in *Allen* v. *Flood* (1): "Any invasion of the civil rights of another person is in itself a legal wrong, carrying with it liability to repair its necessary or natural consequences in so far as these are injurious to the person whose right is infringed."

I cannot suppose any intelligent person reading the evidence adduced on the trial of this case failing to come to the conclusion that the acts complained of amounted to a serious and wrongful invasion of the plaintiff's trade rights, and I am at a loss to comprehend upon what ground it is that the defendants seek to justify or excuse their action towards him.

As members of a trade union society they have no more legal right to commit what would otherwise be unlawful wrongs than if the association to which they are attached had never come into existence. They have no more right to coerce others pursuing the same calling as themselves to join their society, or to adopt their views or rules, than those who differ from them and belong to other trade associations would have a right to coerce them. The Legislature in conferring upon trades unions such privileges as are contained in the Trade Union Acts, 1871 and 1876, does not empower them to do more than make rules for the regulation of their own conduct and to provide for their own mutual assistance, and leaves each member as free to cease to belong to it and to repudiate every obligation for future observance of its rules as though he had never joined it; and most certainly it has not conferred upon any association or any member of it a licence to obstruct or interfere with the freedom of any other person in carrying on his business or bestowing his labour in the way he thinks fit, provided only that it is lawful: see Erle J. in *Reg.* v. *Rowlands* (2); and although a combination of members of a trade union for certain purposes is no longer unlawful and criminal as a conspiracy merely because the objects of that combination are in restraint of trade, no

(1) [1898] A. C. at p. 92. (2) (1851) 2 Den. C. C. 364.

protection is given to any combination or conspiracy which before the passing of the Act of 1871 would have been criminal for other reasons.

Not a word is to be found in the Trade Union Acts or in the Conspiracy Act of 1875 sanctioning such conduct as that complained of. Indeed, one cannot read the 7th section of the latter Act imposing penalties for undue coercion and intimidation without seeing that it had no intention to tolerate such proceedings as in this case are complained of, but rather to protect those upon whom coercive measures might be practised. I may also note that the 3rd section of that Act does not apply to civil proceedings by action.

It would not be useful to examine again all the numerous cases upon the citation and discussion of which much time has been expended, for not one of them would really assist the appellant in defence of his or his co-conspirators' conduct.

The *Mogul Case* (1) contains no doubt a mass of valuable, interesting, and useful law as to the length to which competing traders may go in pushing and endeavouring to promote their respective interests, and yet keep within bounds that are legal, though the stronger and more wealthy of them may sometimes press hardly upon the weaker whose capital is limited. One trader may by his mode of carrying on his trade hold out attractions and allurements which may enlist so many of his rival's customers as will well-nigh, perhaps wholly, destroy his trade.

But not a word will be found in that case justifying an active interference with the right of every trader to carry on his business in his own manner, so long as he does not interfere with a similar legal right which is vested in his neighbour and observes the correlative duty pointed out by Sir W. Erle.

My noble friend, the Lord Chancellor, accurately summed up the position of things in the *Mogul Case* (1) in these words: "What legal right was interfered with? What coercion of the mind, will, or person is effected? All are free to trade on what terms they will, and nothing has been done except in

(1) [1892] A. C. 25.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Brampton.

rival trading which could be supposed to interfere with the appellant's interests."

But I will not linger upon a consideration of what may be done in competition, for competition is not even suggested as a justification of the acts now complained of—acts of wanton aggression the outcome of a malicious but successful conspiracy to harm the plaintiff in his trade.

It cannot be—it was not even suggested—that these acts were done in furtherance of any of the lawful objects of the association as set forth in their registered rules, according to the statutory requirement, or in support of any lawful right of the association or any member of it, or to obtain or maintain fair hours of labour or fair wages, or to promote a good understanding between employers and employed and workman and workman, or for the settlement of any dispute, for none had existence. It would, indeed, be a strange mode of promoting such good understanding to coerce a tradesman's customers to leave him because he would not, at the bidding of the association, dismiss workmen who desired to continue in his service and whom he wished to retain to make way for others he did not want.

I will deal now with the conspiracy part of the claim, respecting which much confusion and uncertainty seems somehow to have arisen, which I find it difficult to understand. I have no intention, however, to embark upon a history of the law relating to the subject, or to the old and obsolete writ of conspiracy. It would be useless for our present purpose.

I will endeavour briefly to state how I view the matter practically, so far as it concerns this case.

A conspiracy consists of an unlawful combination of two or more persons to do that which is contrary to law, or to do that which is wrongful and harmful towards another person. It may be punished criminally by indictment, or civilly by an action on the case in the nature of conspiracy if damage has been occasioned to the person against whom it is directed. It may also consist of an unlawful combination to carry out an object not in itself unlawful by unlawful means. The essential elements, whether of a criminal or of an actionable conspiracy,

are, in my opinion, the same, though to sustain an action special damage must be proved. This is the substance of the decision in *Barber* v. *Lesiter*. (1) I quote as a very instructive definition of a conspiracy the words of a great lawyer, Willes J., in *Mulcahy* v. *Reg.* (2), in delivering the unanimous opinion of himself, Blackburn J., Bramwell B., Keating J., and Pigott B., which was adopted by this House: "A conspiracy consists not merely in the intention of two or more, but in the agreement of two or more to do an unlawful act, or to do a lawful act by unlawful means. So long as such a design rests in intention only it is not indictable. When two agree to carry it into effect, the very plot is an act in itself, and the act of each of the parties, promise against promise, actus contra actum, capable of being enforced, if lawful, punishable if for a criminal object or for the use of criminal means . . . . The number and the compact give weight and cause danger."

It is true these words were uttered touching a criminal case, but they are none the less applicable to conspiracies made the subject of civil actions like the present.

In 1870 Cockburn C.J., in delivering the unanimous judgment of Channell B., Cleasby B., Keating and Brett JJ. in *Reg.* v. *Warburton* (3), said: "It is not necessary, in order to constitute a conspiracy, that the acts agreed to be done should be acts which if done should be criminal. It is enough if the acts agreed to be done, although not criminal, are wrongful, i.e., amount to a civil wrong."

It has often been debated whether, assuming the existence of a conspiracy to do a wrongful and harmful act towards another and to carry it out by a number of overt acts, no one of which taken singly and alone would, if done by one individual acting alone and apart from any conspiracy, constitute a cause of action, such acts would become unlawful or actionable if done by the conspirators acting jointly or severally in pursuance of their conspiracy, and if by those acts substantial damage was caused to the person against whom the conspiracy was directed: my own opinion is that they would.

(1) 7 C. B. (N.S.) 175. (2) (1868) L. R. 3 H. L. at p. 317.
(3) L. R. 1 C. C. 276.

H. L. (I.)
1901
QUINN
v.
LEATHEM.
Lord Brampton.

In dealing with the question it must be borne in mind that a conspiracy to do harm to another is, from the moment of its formation, unlawful and criminal, though not actionable unless damage is the result.

The overt acts which follow a conspiracy form of themselves no part of the conspiracy: they are only things done to carry out the illicit agreement already formed, and if they are sufficient to accomplish the wrongful object of it, it is immaterial whether singly those acts would have been innocent or wrongful, for they have in their combination brought about the intended mischief, and it is the wilful doing of that mischief, coupled with the resulting damage, which constitutes the cause of action, not of necessity the means by which it was accomplished.

Much consideration of the matter has led me to be convinced that a number of actions and things not in themselves actionable or unlawful if done separately without conspiracy may, with conspiracy, become dangerous and alarming, just as a grain of gunpowder is harmless but a pound may be highly destructive, or the administration of one grain of a particular drug may be most beneficial as a medicine but administered frequently and in larger quantities with a view to harm may be fatal as a poison. Many illustrations of these views might be suggested, but I need them not if I have made myself understood.

The cases bearing upon the subject are not very numerous: the whole subject was fully discussed in the *Mogul Case* (1) in each of its stages—to it I simply refer. *Rex* v. *Journeymen Tailors of Cambridge* (2) was an indictment for a common law conspiracy by workmen to raise wages. On objection taken to the indictment it was upheld for the reason given that the conspiracy was illegal, although the matter about which they conspired might have been lawful for them or any to do if they had not conspired to do it; and *Rex* v. *Eccles* (3), before Lord Mansfield, was an indictment for a conspiracy by indirect means to deprive and hinder one Booth from using and

(1) [1892] A. C. 25. (2) (8 Geo. 1) 8 Mod. 11.
(3) 1 Lea. C. C. 274.

exercising his trade of a tailor, and in pursuance of that conspiracy hindering and preventing him from following his said trade to his great damage. It was held unnecessary to set out the means by which the intended mischief was effected, "for the offence does not consist in doing those acts, for they may be perfectly indifferent, but in conspiring with a view to effect the intended mischief by any means. The illegal combination is the git of the offence." See also per Grose J. in *R.* v. *Mawbey*. (1)

If I rightly understand the judgment of Darling J. in *Huttley* v. *Simmons* (2), he treated *Allen* v. *Flood* (3) as a binding authority compelling him to hold that the object of the conspiracy as proved was not unlawful; in that view he rightly decided that the count for conspiracy could not be maintained. If he had held that, although the object of the conspiracy was unlawful, yet if the overt acts were not so, because they would not have been unlawful if done by one individual without any conspiracy, and had decided on that ground, I should have differed.

I am conscious that I have occupied more of your Lordships' time than I had intended, but the case is of real importance, and I feel that such unlawful conduct as has been pursued towards Mr. Leathem demanded serious attention. I think the law is with him, and that the damages awarded by the jury are under the circumstances very moderate. It is at all times a painful thing for any individual to be the object of the hatred, spite, and ill-will of any one who seeks to do him harm. But that is as nothing compared to the danger and alarm created by a conspiracy formed by a number of unscrupulous enemies acting under an illegal compact, together and separately, as often as opportunity occurs regardless of law, and actuated by malevolence, to injure him and all who stand by him. Such a conspiracy is a powerful and dangerous engine, which in this case has, I think, been employed by the defendants for the perpetration of organized and ruinous oppression.

(1) (1796) 6 T. R. 619; 3 R. R. 282. (2) [1898] 1 Q. B. 181.
(3) [1898] A. C. 1.

H. L. (I.) 1901 QUINN v. LEATHEM.

I think the judgment in the Court below ought to be affirmed and this appeal dismissed with costs.

LORD ROBERTSON. (1) My Lords, in my opinion the judgment appealed against was right for the reasons given by Holmes L.J.

LORD LINDLEY. (2) My Lords, the case of *Allen* v. *Flood* (3) has so important a bearing on the present appeal that it is necessary to ascertain exactly what this House really decided in that celebrated case. It was an action by two workmen of an iron company against three members of a trade union, namely, Allen and two others, for maliciously, wrongfully, and with intent to injure the plaintiffs, procuring and inducing the iron company to discharge the plaintiffs. (4) The action was tried before Kennedy J., who ruled that there was no evidence to go to the jury of conspiracy, intimidation, coercion, or breach of contract. The result of the trial was that the plaintiffs obtained a verdict and judgment against Allen alone. He appealed, and the only question which this House had to determine was whether what he had done entitled the plaintiffs to maintain their action against him. What the jury found that he had done was, that he had maliciously induced the employers of the plaintiffs to discharge them, whereby the plaintiffs suffered damage. Different views were taken by the noble Lords who heard the appeal as to Allen's authority to call out the members of the union, and also as to the means used by Allen to induce the employers of the plaintiffs to discharge them; but, in the opinion of the noble Lords who formed the majority of your Lordships' House, all that Allen did was to inform the employers of the plaintiffs that most of their workmen would leave them if they did not discharge the plaintiffs. (5) There

(1) Read by Lord Davey in Lord Robertson's absence.

(2) Read by Lord Davey in Lord Lindley's absence.

(3) [1898] A. C. 1.

(4) [1895] 2 Q. B. 22, 23; [1898] A. C. 3.

(5) [1898] A. C. p. 19, Lord Watson; p. 115 Lord Herschell; pp. 147–150 Lord Macnaghten; pp. 161, 165 Lord Shand; p. 175 Lord Davey; p. 178 Lord James.

being no question of conspiracy, intimidation, coercion, or breach of contract for consideration by the House, and the majority of their Lordships having come to the conclusion that Allen had done no more than I have stated, the majority of the noble Lords held that the action against Allen would not lie; that he had infringed no right of the plaintiffs; that he had done nothing which he had no legal right to do, and that the fact that he had acted maliciously and with intent to injure the plaintiffs did not, without more, entitle the plaintiffs to maintain the action.

My Lords, this decision, as I understand it, establishes two propositions: one a far-reaching and extremely important proposition of law, and the other a comparatively unimportant proposition of mixed law and fact, useful as a guide, but of a very different character from the first.

The first and important proposition is that an act otherwise lawful, although harmful, does not become actionable by being done maliciously in the sense of proceeding from a bad motive, and with intent to annoy or harm another. This is a legal doctrine not new or laid down for the first time in *Allen* v. *Flood* (1); it had been gaining ground for some time, but it was never before so fully and authoritatively expounded as in that case. In applying this proposition care, however, must be taken to bear in mind, first, that in *Allen* v. *Flood* (1) criminal responsibility had not to be considered. It would revolutionise criminal law to say that the criminal responsibility for conduct never depends on intention. Secondly, it must be borne in mind that even in considering a person's liability to civil proceedings the proposition in question only applies to "acts otherwise lawful," i.e., to acts involving no breach of duty, or, in other words, no wrong to any one. I shall refer to this matter later on.

The second proposition is that what Allen did infringed no right of the plaintiffs, even although he acted maliciously and with a view to injure them. I have already stated what he did, and all that he did, in the opinion of the majority of the noble Lords. If their view of the facts was correct, their

(1) [1898] A. C. 1.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Lindley.

conclusion that Allen infringed no right of the plaintiffs is perfectly intelligible, and indeed unavoidable. Truly, to inform a person that others will annoy or injure him unless he acts in a particular way cannot of itself be actionable, whatever the motive or intention of the informant may have been.

My Lords, the questions whether Allen had more power over the men than some of their Lordships thought, and whether Allen did more than they thought, are mere questions of fact. Neither of these questions is a question of law, and no Court or jury is bound as a matter of law to draw from the facts before it inferences of fact similar to those drawn by noble Lords from the evidence relating to Allen in the case before them.

I will pass now to the facts of this case, and consider (1.) what the plaintiff's rights were; (2.) what the defendants' conduct was; (3.) whether that conduct infringed the plaintiff's rights. For the sake of clearness it will be convenient to consider these questions in the first place apart from the statute which legalises strikes, and in the next place with reference to that statute.

1. As to the plaintiff's rights. He had the ordinary rights of a British subject. He was at liberty to earn his own living in his own way, provided he did not violate some special law prohibiting him from so doing, and provided he did not infringe the rights of other people. This liberty involved liberty to deal with other persons who were willing to deal with him. This liberty is a right recognised by law; its correlative is the general duty of every one not to prevent the free exercise of this liberty, except so far as his own liberty of action may justify him in so doing. But a person's liberty or right to deal with others is nugatory, unless they are at liberty to deal with him if they choose to do so. Any interference with their liberty to deal with him affects him. If such interference is justifiable in point of law, he has no redress. Again, if such interference is wrongful, the only person who can sue in respect of it is, as a rule, the person immediately affected by it; another who suffers by it has usually no redress; the damage to him is too remote, and it would be obviously

practically impossible and highly inconvenient to give legal redress to all who suffered from such wrongs. But if the interference is wrongful and is intended to damage a third person, and he is damaged in fact—in other words, if he is wrongfully and intentionally struck at through others, and is thereby damnified—the whole aspect of the case is changed: the wrong done to others reaches him, his rights are infringed although indirectly, and damage to him is not remote or unforeseen, but is the direct consequence of what has been done. Our law, as I understand it, is not so defective as to refuse him a remedy by an action under such circumstances. The cases collected in the old books on actions on the case, and the illustrations given by the late Bowen L.J. in his admirable judgment in the *Mogul Steamship Company's Case* (1), may be referred to in support of the foregoing conclusion, and I do not understand the decision in *Allen* v. *Flood* (2) to be opposed to it.

If the above reasoning is correct, *Lumley* v. *Gye* (3) was rightly decided, as I am of opinion it clearly was. Further, the principle involved in it cannot be confined to inducements to break contracts of service, nor indeed to inducements to break any contracts. The principle which underlies the decision reaches all wrongful acts done intentionally to damage a particular individual and actually damaging him. *Temperton* v. *Russell* (4) ought to have been decided and may be upheld on this principle. That case was much criticised in *Allen* v. *Flood* (2), and not without reason; for, according to the judgment of Lord Esher, the defendants' liability depended on motive or intention alone, whether anything wrong was done or not. This went too far, as was pointed out in *Allen* v. *Flood*. (2) But in *Temperton* v. *Russell* (4) there was a wrongful act, namely, conspiracy and unjustifiable interference with Brentano, who dealt with the plaintiff. This wrongful act warranted the decision, which I think was right.

2. I pass on to consider what the defendants did. The appellant and two of the other defendants were the officers of a trade union, and the jury have found that the defendants wrongfully

(1) 23 Q. B. D. 613, 614.
(2) [1898] A. C. 1.
(3) 2 E. & B. 216.
(4) [1893] 1 Q. B. 715.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Lindley.

and maliciously induced the customers of the plaintiff to refuse to deal with him, and maliciously conspired to induce them not to deal with him. There were similar findings as to inducing servants of the plaintiff to leave him. What the defendants did was to threaten to call out the union workmen of the plaintiff and of his customers if he would not discharge some non-union men in his employ. In other words, in order to compel the plaintiff to discharge some of his men, the defendants threatened to put the plaintiff and his customers, and persons lawfully working for them, to all the inconvenience they could without using violence. The defendants' conduct was the more reprehensible because the plaintiff offered to pay the fees necessary to enable his non-union men to become members of the defendants' union; but this would not satisfy the defendants. The facts of this case are entirely different from those which this House had to consider in *Allen* v. *Flood*. (1) In the present case there was no dispute between the plaintiff and his men. None of them wanted to leave his employ. Nor was there any dispute between the plaintiff's customers and their own men, nor between the plaintiff and his customers, nor between the men they respectively employed. The defendants called no witnesses, and there was no evidence to justify or excuse the conduct of the defendants. That they acted as they did in furtherance of what they considered the interests of union men may probably be fairly assumed in their favour, although they did not come forward and say so themselves; but that is all that can be said for them. No one can, I think, say that the verdict was not amply warranted by the evidence. I have purposely said nothing about the black list, as the learned judge who tried the case considered that the evidence did not connect the appellant with that list. But the black list was, in my opinion, a very important feature in the case.

3. The remaining question is whether such conduct infringed the plaintiff's rights so as to give him a cause of action. In my opinion, it plainly did. The defendants were doing a great deal more than exercising their own rights: they were dictating to the plaintiff and his customers and servants what they

(1) [1898] A. C. 1.

were to do. The defendants were violating their duty to the plaintiff and his customers and servants, which was to leave them in the undisturbed enjoyment of their liberty of action as already explained. What is the legal justification or excuse for such conduct? None is alleged, and none can be found. This violation of duty by the defendants resulted in damage to the plaintiff—not remote, but immediate and intended. The intention to injure the plaintiff negatives all excuses and disposes of any question of remoteness of damage. Your Lordships have to deal with a case, not of damnum absque injuria, but of damnum cum injuria.

Every element necessary to give a cause of action on ordinary principles of law is present in this case. As regards authorities, they were all exhaustively examined in the *Mogul Steamship Co.* v. *MacGregor* (1) and *Allen* v. *Flood* (2), and it is unnecessary to dwell upon them again. I have examined all those which are important, and I venture to say that there is not a single decision anterior to *Allen* v. *Flood* (2) in favour of the appellant. His sheet-anchor is *Allen* v. *Flood* (2), which is far from covering this case, and which can only be made to cover it by greatly extending its operation.

It was contended at the bar that if what was done in this case had been done by one person only, his conduct would not have been actionable, and that the fact that what was done was effected by many acting in concert makes no difference. My Lords, one man without others behind him who would obey his orders could not have done what these defendants did. One man exercising the same control over others as these defendants had could have acted as they did, and, if he had done so, I conceive that he would have committed a wrong towards the plaintiff for which the plaintiff could have maintained an action. I am aware that in *Allen* v. *Flood* (2) Lord Herschell (3) expressed his opinion to be that it was immaterial whether Allen said he would call the men out or not. This may have been so in that particular case, as there was evidence that Allen had no power to call out the men, and the men had

(1) [1892] A. C. 25. (2) [1898] A. C. 1.
(3) [1898] A. C. at pp. 128, 138.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Lindley.

determined to strike before Allen had anything to do with the matter. But if Lord Herschell meant to say that as a matter of law there is no difference between giving information that men will strike and making them strike, or threatening to make them strike, by calling them out when they do not want to strike, I am unable to concur with him. It is all very well to talk about peaceable persuasion. It may be that in *Allen* v. *Flood* (1) there was nothing more; but here there was very much more. What may begin as peaceable persuasion may easily become, and in trades union disputes generally does become, peremptory ordering, with threats open or covert of very unpleasant consequences to those who are not persuaded. Calling workmen out involves very serious consequences to such of them as do not obey. Black lists are real instruments of coercion, as every man whose name is on one soon discovers to his cost. A combination not to work is one thing, and is lawful. A combination to prevent others from working by annoying them if they do is a very different thing, and is primâ facie unlawful. Again, not to work oneself is lawful so long as one keeps off the poor-rates, but to order men not to work when they are willing to work is another thing. A threat to call men out given by a trade union official to an employer of men belonging to the union and willing to work with him is a form of coercion, intimidation, molestation, or annoyance to them and to him very difficult to resist, and, to say the least, requiring justification. None was offered in this case.

My Lords, it is said that conduct which is not actionable on the part of one person cannot be actionable if it is that of several acting in concert. This may be so where many do no more than one is supposed to do. But numbers may annoy and coerce where one may not. Annoyance and coercion by many may be so intolerable as to become actionable, and produce a result which one alone could not produce. I am aware of the difficulties which surround the law of conspiracy both in its criminal and civil aspects; and older views have been greatly and, if I may say so, most beneficially modified by the discussions and decisions in America and this country.

(1) [1898] A. C. 1.

Amongst the American cases I would refer especially to *Vegelahn* v. *Guntner* (1), where coercion by other means than violence, or threats of it, was held unlawful. In this country it is now settled by the decision of this House in the case of the *Mogul Steamship Co.* (2) that no action for a conspiracy lies against persons who act in concert to damage another and do damage him, but who at the same time merely exercise their own rights and who infringe no rights of other people. *Allen* v. *Flood* (3) emphasises the same doctrine. The principle was strikingly illustrated in the *Scottish Co-operative Society* v. *Glasgow Fleshers' Association* (4), which was referred to in the course of the argument. In this case some butchers induced some salesmen not to sell meat to the plaintiffs. The means employed were to threaten the salesmen that if they continued to sell meat to the plaintiffs they, the butchers, would not buy from the salesmen. There was nothing unlawful in this, and the learned judge held that the plaintiffs shewed no cause of action, although the butchers' object was to prevent the plaintiffs from buying for co-operative societies in competition with themselves, and the defendants were acting in concert.

The cardinal point of distinction between such cases and the present is that in them, although damage was intentionally inflicted on the plaintiffs, no one's right was infringed—no wrongful act was committed; whilst in the present case the coercion of the plaintiff's customers and servants, and of the plaintiff through them, was an infringement of their liberty as well as his, and was wrongful both to them and also to him, as I have already endeavoured to shew.

Intentional damage which arises from the mere exercise of the rights of many is not, I apprehend, actionable by our law as now settled. To hold the contrary would be unduly to restrict the liberty of one set of persons in order to uphold the liberty of another set. According to our law, competition, with all its drawbacks, not only between individuals, but between associations, and between them and individuals, is permissible, provided nobody's rights are infringed. The law is the same

(1) 167 Mass. 92.
(2) [1892] A. C. 25; 23 Q. B. D. 598.
(3) [1898] A. C. 1.
(4) 35 Sc. L. R. 645.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Lindley.

for all persons, whatever their callings: it applies to masters as well as to men; the proviso, however, is all-important, and it also applies to both, and limits the rights of those who combine to lock-out as well as the rights of those who strike. But coercion by threats, open or disguised, not only of bodily harm but of serious annoyance and damage, is primâ facie, at all events, a wrong inflicted on the persons coerced; and in considering whether coercion has been applied or not, numbers cannot be disregarded.

My Lords, the appellant relied on several authorities besides those already referred to, which I will shortly notice. No coercion of the plaintiff's employer, customers, servants, or friends had to be considered in *Kearney* v. *Lloyd*. (1) This is fully shewn in the various judgments now under review.

In *Huttley* v. *Simmons* (2) the plaintiff was a cab-driver in the employ of a cab-owner. The defendants were four members of a trade union who were alleged to have maliciously induced the cab-owner not to employ the plaintiff, and not to let him have a cab to drive. The report does not state the means employed to induce the cab-owner to refuse to have any dealings with the plaintiff. The learned judge who tried the case held that as to three of the defendants the plaintiff had no case, and that as to the fourth, against whom the jury found a verdict, no action would lie because he had done nothing in itself wrong, apart from motive, and that the fact that he acted in concert with others made no difference. It is difficult to draw any satisfactory conclusion from this case, as the most material facts are not stated.

I conclude this part of the case by saying that, in my opinion, the direction given to the jury by the learned judge who tried the case was correct, so far as the liability of the defendants turns on principles of common law, and that the objection taken to it by the counsel for the appellant is untenable. I mean the objection that the learned judge did not distinguish between coercion to break contracts of service, and coercion to break contracts of other kinds, and coercion not to enter into contracts.

(1) 26 L. R. Ir. 268. (2) [1898] 1 Q. B. 181.

I pass now to consider the effect of the statute 38 & 39 Vict. c. 86. This Act clearly recognises the legality of strikes and lock-outs up to a certain point. It is plainly legal now for workmen to combine not to work except on their own terms. On the other hand, it is clearly illegal for them or any one else to use force or threats of violence to prevent other people from working on any terms which they think proper. But there are many ways short of violence, or the threat of it, of compelling persons to act in a way which they do not like. There are annoyances of all sorts and degrees: picketing is a distinct annoyance, and if damage results is an actionable nuisance at common law, but if confined merely to obtaining or communicating information it is rendered lawful by the Act (s. 7). Is a combination to annoy a person's customers, so as to compel them to leave him unless he obeys the combination, permitted by the Act or not? It is not forbidden by s. 7; is it permitted by s. 3? I cannot think that it is. The Court of Appeal (of which I was a member) so decided in *Lyons* v. *Wilkins* (1), in the case of Schoenthal, which arose there, and is referred to in the judgment of Walker L.J. at p. 99 of the printed judgments in this case. This particular point had not to be reconsidered when *Lyons* v. *Wilkins* (1) came before the Court of Appeal after the decision in *Allen* v. *Flood*. (2) But Byrne J. modified the injunction granted on the first occasion (3) by confining it to watching and besetting. He might safely have gone further and have restrained the use of other unlawful means; but the strike was then over, and his modification was not objected to, and cannot be regarded as an authority in favour of the appellant's contention.

It must be conceded that if what the defendants here did had been done by one person it would not have been punishable as a crime. I cannot myself see that there was in this case any trade dispute between employers and workmen within the meaning of s. 3. I am not at present prepared to say that the officers of a trade union who create strife by calling out members of the union working for an employer with whom none of them

(1) [1896] 1 Ch. 811.
(2) See [1899] 1 Ch. 255.
(3) See [1899] 1 Ch. at pp. 258, 259.

H. L. (I.) 1901 QUINN v. LEATHEM. Lord Lindley.

have any dispute can invoke the benefit of this section even on an indictment for a conspiracy.

But assuming that there was a trade dispute within the meaning of s. 3, and that an indictment for conspiracy could not be sustained in a case like this, the difference between an indictment for a conspiracy and an action for damages occasioned by a conspiracy is very marked and is well known. An illegal agreement, whether carried out or not, is the essential element in a criminal case; the damage done by several persons acting in concert, and not the criminal conspiracy, is the important element in the action for damages. (1) In my opinion, it is quite clear that s. 3 has no application to civil actions: it is confined entirely to criminal proceedings. Nor can I agree with those who say that the civil liability depends on the criminality, and that if such conduct as is complained of has ceased to be criminal it has therefore ceased to be actionable. On this point I will content myself by saying that I agree with Andrews J. and those who concurred with him. It does not follow, and it is not true, that annoyances which are not indictable are not actionable. The law relating to nuisances, to say nothing of the law relating to combinations, shews that many annoyances are actionable which are not indictable, and the principles of justice on which this is held to be so appear to me to apply to such cases as these.

My Lords, I will detain your Lordships no longer. *Allen* v. *Flood* (2) is in many respects a very valuable decision, but it may be easily misunderstood and carried too far.

Your Lordships are asked to extend it and to destroy that individual liberty which our laws so anxiously guard. The appellant seeks by means of *Allen* v. *Flood* (2), and by logical reasoning based upon some passages in the judgments given by the noble Lords who decided it, to drive your Lordships to hold that boycotting by trades unions in one of its most objectionable forms is lawful, and gives no cause of action to its victims although they may be pecuniarily ruined thereby.

My Lords, so to hold would, in my opinion, be contrary to

(1) See 1 Wm. Saund. 229 b, 230, and *Barber* v. *Lesiter*, 7 C. B. (N.S.) 175.
(2) [1898] A. C. 1.

well-settled principles of English law, and would be to do what is not yet authorized by any statute or legal decision.

In my opinion this appeal ought to be dismissed with costs.

Order appealed from affirmed and appeal dismissed with costs.

Lords' Journals, August 5, 1901.

Solicitors: *Eyre, Dowling & Co., for Joseph Donnelly, Belfast; Francis H. White, for G. B. Wilkins, Lisburn.*

[PRIVY COUNCIL.]

J. C.*
1901
May 9;
June 13.

COLONIAL SUGAR REFINING COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

ATTORNEY-GENERAL FOR VICTORIA PLAINTIFF.

ON APPEAL FROM THE SUPREME COURT OF VICTORIA.

Law of Victoria—Victoria Customs and Excise Duties Act, 1895, *Schedule—Construction—"Molasses refined in Bond."*

Molasses strained and filtered in a bonded warehouse so as to free them from impurities contracted in uncovered tanks, but not involving any chemical change or alteration in colour, taste, or smell, cannot be regarded as "molasses refined in bond" within the meaning of that expression as used in the Victoria Customs and Excise Duties Act, 1895.

APPEAL from an order of the Supreme Court (May 10, 1900) reversing an order of Madden C.J. (March 13, 1900).

The action was brought by the respondent against the appellants to recover the sum of 1369*l.* 3*s.* 10*d.* as being arrears of duties payable by them to the Crown. The question in the appeal was whether molasses, after being subjected by the appellants to a certain process described in their Lordships' judgment, were liable to duty as "molasses unrefined" or as "molasses refined in bond" within the meaning of the schedule to the Duties of Customs Act, 1893 (No. 2) (No. 1321, 57 Vict.), and of the schedule to the Customs and Excise Duties Act, 1895 (No. 1401, 59 Vict.). By the former Act a tax was imposed of 2*s.* per cwt. on "molasses unrefined," and a tax was imposed of 4*s.* per cwt. on "molasses refined in bond." By the later Act the tax of 2*s.* per cwt. on "molasses unrefined" was reimposed, and the tax on "molasses refined in bond" was raised to 5*s.* per cwt.

At the trial Madden C.J. entered judgment for the appellants on the ground that the process so described was a mere

* *Present:* LORD MACNAGHTEN, LORD JAMES OF HEREFORD, LORD LINDLEY, SIR RICHARD COUCH, and SIR FORD NORTH.

straining of the molasses by which foreign matters were extracted, and was not a refining process, which he thought involved the separation from the substance refined of impurities naturally inherent in it. Upon appeal the Full Court (Holroyd, A'Beckett, and Hood JJ.) reversed this decision and entered judgment for the respondent, on the ground that there was nothing to which the word "refined" could refer in connection with molasses if it were not to the process in use by the appellants.

Dickens, K.C., and *Mansfield*, for the appellant, contended that the appellants' process merely got rid of extrinsic impurities from the molasses, and did not effect any change therein, chemical or otherwise. The word "refined" has a recognised meaning among persons conversant with the sugar trade which does not include a mere cleansing process, and the word when used in a taxing Act should be construed as bearing that recognised meaning, and ought not to be extended in its meaning so as to impose on the subject a tax which the Legislature has not clearly made him pay: see *In re Thorley*. (1)

Haldane, K.C., *Bray, K.C.*, and *Rowlatt*, for the respondent, contended that molasses from which impurities rendering it unfit for human food have been removed are "refined molasses" within the meaning of the Acts in question. It is immaterial whether those impurities are intrinsic or extrinsic. Their removal in either case alters the character of the product in value and for commercial purposes. It is not shewn that molasses are further or otherwise refined than by removing such impurities.

Mansfield replied.

1901
June 13.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The question in this case is, What is the duty payable by the appellants, the Colonial Sugar Refining Company, Limited, in respect of molasses imported by them into Victoria and cleared there for home consumption after undergoing treatment at their works at Yarraville in a

(1) [1891] 2 Ch. 613, 623.

J. C. 1901 COLONIAL SUGAR REFINING COMPANY v. ATTORNEY-GENERAL FOR VICTORIA.

bonded warehouse approved under s. 12 of the Customs Act, 1890? The Attorney-General contends that these molasses ought to pay duty as "molasses refined in bond." The appellants maintain that they are only chargeable as "molasses unrefined." The duty on "molasses unrefined" is 2*s.* per cwt. On "molasses refined in bond" the duty now is 5*s.* per cwt.; before June 5, 1895 the duty was 4*s.* per cwt. The question is one of some difficulty. Madden C.J., by whom the action was tried, decided in favour of the appellants. The Full Court on appeal reversed his decision.

The molasses imported by the appellants into Victoria are produced at their sugar mills at Sydney in New South Wales. There cane juice is treated with lime in order to coagulate the albuminous matter in it. It is then passed through flannel or cotton or crushed cane to remove the albumen. The liquid so filtered is a bright solution which is reduced by evaporation so as to allow sugar to crystallise. It is then worked in a centrifugal machine. The process is repeated two or three times. The residuum uncrystallised which is known as molasses is a thick solution of little commercial value. It is run into large open tanks. The bulk is afterwards discharged into the sea, but as much as can be disposed of profitably is allowed to remain in the tanks until it is sent to Yarraville. While lying in the tanks uncovered the stuff contracts impurities of all sorts: dust, ashes, flies, beetles, and even frogs get into it. Before it can be used it is subjected to a treatment intended to remove these foreign impurities and restore it to the condition in which it was when originally produced, and in which, according to one of the witnesses, it would have remained if it had been run into "airtight receptacles" instead of open tanks. The process of purification is as follows: The raw molasses are mixed up in an iron vessel, water is added and steam injected. The syrup so diluted and heated is passed through filtering bags into which hot water is afterwards poured in order to extract any saccharine matter left in the sediment. The liquid collected is then reduced by evaporation in vacuum pans to the proper consistency and added to refined cane sugar syrup, or "golden syrup" as it is called, in the proportion of about

8 or 10 per cent. This mixture is sold in the market as "refined treacle."

The object of adding water and injecting steam is merely to facilitate filtration, and the vacuum pans are used merely for the purpose of removing the surplus water. In the process molasses undergo no chemical change whatever. Their colour is not altered. Their peculiar taste and smell are retained unimpaired. The molasses impart colour and flavour to the golden syrup with which they are mixed. The mahogany tint and the acid taste or bite are said to suit the fancy of the public, and the mixture sells better than pure golden syrup.

It is common ground that there is no article known, or in other words sold in the market, as "refined molasses," and that molasses as treated by the appellants are not sold unmixed or used except for the purpose of colouring and flavouring golden syrup. In refining sugar upon which a corresponding duty is placed charcoal is used, and according to the evidence has a chemical as well as a mechanical effect. It removes colour, and it was admitted by the principal witness for the Crown that "to a sugar expert 'refining' means to a great extent removal of colour."

On the evidence before him Madden C.J. came to the conclusion that the molasses strained and filtered at the appellants' works at Yarraville could not properly be described as "refined molasses," and were not in fact "molasses refined in bond" within the meaning of that expression as used in the Customs Act.

The Full Court on appeal held that the Legislature intended to tax some article, and that the appellants must pay the higher duty, as there was nothing to which the term "refined molasses" could apply except to molasses subjected to such a process as that to which the appellants had subjected their molasses.

It appears, however, that on this point the Full Court was in error. Although no article is or apparently ever has been sold as "refined molasses," there is a well-known process of refining molasses by charcoal, much in the same way as sugar is commonly refined. From 1857 to 1887 a company, who

J. C.
1901
COLONIAL SUGAR REFINING COMPANY v. ATTORNEY-GENERAL FOR VICTORIA.

were the predecessors in business of the appellants, passed all their molasses over charcoal, and it appears that a firm in Victoria, trading as "Swallow & Ariell," used charcoal in refining molasses up to the year 1899. In fact, it was only when they abandoned the process as being too costly that the customs officer in charge of the factory at Yarraville raised a question as to the appellants' process, which had been going on since 1893 without objection.

Their Lordships are of opinion that the view of Madden C.J. is correct, and they will humbly advise His Majesty that this appeal ought to be allowed, and the judgment of the Chief Justice restored, and that the respondent ought to pay the costs of the appeal to the Full Court, and repay to the appellants any costs paid to him in pursuance of the order of that Court of May 10, 1900.

The respondent will pay the costs of the appeal.

Solicitors for appellants: *Wadeson & Malleson.*
Solicitors for respondent *Freshfields.*

[PRIVY COUNCIL].

MASTER AND OWNERS OF SS. BAKU STANDARD . . . . . } DEFENDANTS;

AND

MASTER AND OWNERS OF SS. ANGÈLE . . . . . } PLAINTIFFS.

J. C.* 1901 May 8; June 13.

ON APPEAL FROM HIS BRITANNIC MAJESTY'S SUPREME CONSULAR COURT AT CONSTANTINOPLE.

Salvage—Injury to Salving Vessel—Compensation—Onus probandi.

Where the vessel of a salvor has without default on his part been injured in the performance of salvage services, compensation may be awarded to him in respect of the injury so sustained and damages consequent thereon; or the salvage may be assessed on a liberal scale, so as to cover the loss and afford an adequate reward for the services rendered:—

Held, also, that the presumption is that the injury is caused by the necessities of the services, and that the onus probandi is on those who allege default by the salvors. The amount of compensation awarded by the Court below will not be reduced unless it appears to be grossly in excess of what is right.

APPEAL from a decree of the Supreme Consular Court (April 3, 1900), confirming a judgment of O'Malley J. (Dec. 23, 1899).

The earlier judgment held that the appellants were liable under the circumstances stated in their Lordships' judgment for salvage services, for damage to the propeller of the *Angèle*, and for demurrage incurred while repairing such damage; for the reason that it was to be presumed that damage caused to the salvors during the rendering of salvage services was caused by the necessities of the services and not by default of the salvors, and that the burden of proof to the contrary lay on the appellants.

Aspinall, K.C., and *Scrutton, K.C.*, for the appellants.

Joseph Walton, K.C., and *Stubbs*, for the respondents.

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

J. C.
1901

MASTER AND OWNERS OF SS. BAKU STANDARD *v.* MASTER AND OWNERS OF SS. ANGÈLE.

1901. June 13. The judgment of their Lordships was delivered by

SIR FORD NORTH. This is an appeal by the master and owners of the SS. *Baku Standard* from a judgment of the Supreme Consular Court at Constantinople, affirming a judgment of the Honourable Mr. Justice O'Malley by which he awarded to the master and owners of the SS. *Angèle* (the present respondents) the sum of 1000*l.* for salvage and towage services; and also damages, subsequently assessed at 1316*l.* 11*s.* 7*d.*

The facts are as follows:—

The *Baku Standard*, of London, is a large oil-tank screw steamer of 2375 tons register. On the evening of December 10, 1898, while passing through the Sea of Marmora on a voyage to Batoum in ballast, she became disabled by the fracture of her propeller shaft. This was about 6 P.M. She was practically in no danger, as she was not making any water, there were numerous steamers about, and the weather was not unfavourable. Tugs could easily have been procured the next day from either Constantinople or the Dardanelles, and if in the meantime the currents had carried her towards the shore she could have anchored in safety. But she was helpless, and made the usual signals for assistance.

First one and then another steamer came up and offered help, but the master declined their aid, thinking he might do better. About 10 P.M. the *Angèle*, having seen the signals, came up. She was a British steamer of 1149 tons, belonging to Malta, and bound for Constantinople in ballast; and after some discussion it was agreed that she should tow the *Baku Standard* to Constantinople, then about fifty miles distant. The price to be paid for her services was left to be settled between the owners. Accordingly a 4½-inch wire hawser belonging to the *Baku Standard* was carried to the *Angèle* and made fast on her starboard quarter. The other end of that hawser was shackled to the starboard cable of the *Baku Standard*, the total distance between the vessels being about sixty fathoms. When ready the *Angèle*, with the other vessel

in tow, started for Constantinople, between midnight and 1 A.M. on December 11.

It appears that both vessels (probably from being in ballast) steered irregularly and yawed a good deal. About 3 A.M. a violent shock was felt on board the *Angèle* and her engines began to race, indicating some injury to the screw. But she completed her tow to Constantinople, reaching that port in the evening of the same day.

Upon her arrival there it was found that two of the four blades of her propeller had been broken off from the boss, while a third blade had also been broken across about 8 inches from the boss. There can be no doubt that this occurred at the time of the shock above mentioned; but there is no direct evidence what was the cause of the accident. Various suggestions are made. One is that the tow-rope became slack from the yawing of the vessels, and when slack had fouled the screw of the *Angèle*, and so caused the damage. The nautical assessors consulted by their Lordships were of opinion that this was possible; but that, if it occurred, the hawser also must have sustained injury. There is evidence that when it was examined after the towage was ended the hawser shewed no indication of its having been in contact with the screw, as it was not bruised, nor were any of the wire strands broken or frayed; but this inspection was not made in the presence of any one representing the respondents. Another suggestion was that the screw might have come in contact with some floating wreckage. This also seems possible. It was said on the other hand that no wreckage was seen; but as the accident occurred at 3 A.M. on a very dark night in December this is not surprising. There was nothing in the state of the weather to account for what happened. Both sides agree that the force of the wind was about No. 3 of the Beaufort scale—a very moderate breeze; and there was no sea on to speak of. Another suggestion was that the screw might have come into contact with some stone or rock at the bottom; but this may be put aside. In the result it is impossible to ascribe the injury with certainty to any definite cause. It occurred during

J. C.
1901
MASTER AND OWNERS OF SS. BAKU STANDARD
v.
MASTER AND OWNERS OF SS. ANGÈLE.

the towage; and there is no proof that the master and crew of the *Angèle* were guilty of any negligence or unskilful management.

This action was instituted on behalf of the master and owners of the *Angèle*, who claimed salvage, and also the amount of damage actually sustained by the *Angèle* in carrying out the salvage work, with consequent demurrage and other expenses. The judge of the Supreme Consular Court condemned the defendants in 1000*l.* for salvage service, and also for the other damages claimed, the amount to be ascertained by the registrar. This decision was affirmed on appeal. The amount claimed for damages was 1504*l.* 5*s.* 1*d.*, and the registrar awarded 1316*l.* 11*s.* 7*d.*, made up of repairs, 532*l.* 19*s.* 10*d.*; demurrage, 546*l.* 6*s.*; dock dues, 192*l.* 1*s.* 3*d.*; and a few small items.

To deal first with the question of damages. It is clearly settled that when the vessel of a salvor has, without default on his part, been injured in the performance of salvage services, compensation may be awarded to him in respect of the injury so sustained, and damages consequent thereon. It was laid down by this Committee in the case of *Bird and Others* v. *Gibb and Others* (*The De Bay*) (1) that it is always justifiable—and sometimes important, if it can be done—to ascertain what damages and losses the salving vessel has sustained in rendering salvage services. It is often difficult and expensive, and sometimes impossible, to ascertain exactly the amount of such loss, and in such cases the amount of salvage must be assessed in a general manner, upon so liberal a scale as to cover the loss, and to afford also an adequate reward for the services rendered. It was also laid down in the case of *The Thomas Blyth* (2) that, when the vessel of a salvor is injured or lost while engaged in a salvage service, the presumption is that the injury or loss is caused by the necessities of the service, and not by the default of the salvors; and that the burthen of proof lies upon the parties who allege that the loss was caused by the salvors' own acts.

Adopting the principles thus laid down, and in the absence of any evidence that the damage to the *Angèle* was caused

(1) (1883) 8 App. Cas. 559.
(2) (1860) Lush. 16.

by negligence or default on the part of the master or crew of that vessel, their Lordships are of opinion that the damages assessed by the registrar were rightly awarded against the appellants.

This being so, the compensation to be given for salvage services, as distinguished from compensation for damage, ought to be calculated on a less liberal scale than if the sum given for salvage was intended to cover compensation for damage also. Their Lordships are of opinion that, considering the evidence, and that the compensation for damage is dealt with separately, full justice would have been done by an award of less than 1000*l.* for salvage. But this is a question of amount only, and it is not the custom of this Committee to vary the decision of a Court below on a question of amount merely because they are of opinion that, if the case had come before them in the first instance, they might have awarded a smaller sum. It has been laid down in *The De Bay* (1) (mentioned above) and other cases that they will only do so if the amount awarded appears to them to be grossly in excess of what is right; which is not the case here.

Their Lordships will therefore humbly advise His Majesty that this appeal should be dismissed. The appellants must pay the respondents' costs.

Solicitors for appellants: *Thomas Cooper & Co.*
Solicitors for respondents: *Jull, Godfrey & Danvers.*

(1) 8 App. Cas. 559.

[PRIVY COUNCIL.]

J. C.* 1901

May 7; June 13.

CALEDONIAN COAL COMPANY, LIMITED . . . . . } DEFENDANTS;

AND

SEAHAM COLLIERY COMPANY, LIMITED . . . . . } PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Agreement to Construct a Railway jointly—Construction—Rights of Joint Owners.

Where two colliery companies agreed to construct a railway between their respective collieries and the Government railway, and by the New South Wales Act which empowered the same it was provided that the new railway should be open to the public upon payment of a toll to the two companies for every ton of goods carried for the public, and that owners and occupiers of lands traversed by the railway might construct branch railways communicating therewith:—

Held, that, in the absence of prohibitive words in the agreement, either colliery company was at liberty to construct a branch railway and have its coal thence brought to the joint railway carried over it free of the toll, which was chargeable only to the public.

APPEAL from a decree of the Chief Judge in Equity (July 23, 1900).

The respondents claimed a declaration that the appellants, under the circumstances stated in their Lordships' judgment, were liable, as owners of the Killingworth Colliery, to pay to the respondents and the appellants, as joint owners of the railway which they had jointly constructed, way-leave upon all goods or coal carried upon the railway to or from the Killingworth Colliery at the same rate as was chargeable to the public under the provisions of a certain Act of the Parliament of New South Wales relating to the railway, and also claimed incidental relief.

The question at issue was shortly as follows: The appellants and respondents are colliery companies and are joint owners or

* *Present:* LORD MACNAGHTEN, LORD JAMES OF HEREFORD, LORD LINDLEY, SIR RICHARD COUCH, and SIR FORD NORTH.

co-owners of a railway in the parish of Teralba, in the Colony of New South Wales, under arrangements which provided that the cost of renewals and maintenance of the railway line were to be paid by the joint owners in proportion to the traffic done by them respectively. The "West Wallsend and Monk Wearmouth Act of 1886," under which the railway was built, provided that the railway was to be open to the public use on payment of certain tolls. The question was whether the appellants were entitled as joint owners of the railway to use it for carrying goods and coal from a certain colliery called the Killingworth Colliery on paying such extra share of the cost of renewal and maintenance as might be proportionate to the additional traffic done by them on the railway in carrying such goods and coal; or whether the appellants ought to pay the same tolls in respect of goods and coal carried from the Killingworth Colliery as if the appellants were using the railway merely by virtue of the right of user conferred on the public by the said Act, and not as joint owner.

The Chief Judge held, that on the true construction of the Act of 1886, if a branch line were made under s. 4, the persons using the joint railway for traffic coming from the branch would have to pay the tolls mentioned in s. 3. The appellants, as joint owners, used the joint railway for goods conveyed on their branch line, and were bound to pay the tolls at the same rate as was chargeable to the public.

Haldane, *K.C.*, and *Clauson*, for the appellants, contended that, on the true construction of the Act of 1886, no tolls or way-leave were payable except by the public. Nothing in either the Act or the agreement imposed on the appellants or their predecessors any liability to that effect. They did not come within the expression "public," which as used in s. 3 does not include any of the owners of the joint railway. Neither the appellants nor their predecessors in title had ever rendered themselves liable to pay the tolls in question by any subsequent agreement. Nor was it shewn that they had constructed their branch line under s. 4; they had the right to make it by virtue of their joint ownership of the principal line. They were

J. C. 1901 CALEDONIAN COAL COMPANY v. SEAHAM COLLIERY COMPANY.

tenants in common or joint owners of that line, and there was nothing in either the Act or the scheduled agreement to restrict the right, inherent in their title, to use the joint railway for the carriage of their goods, subject only to the liability of bearing the cost of renewals and maintenance thereof in proportion to the traffic done by them in comparison with the traffic done by the respondents: see *Jacobs* v. *Seward* (1); *McMahon* v. *Burchell.* (2)

Swinfen Eady, K.C., and *Alfred Adams*, for the respondents, contended that the appellants and respondents were not strictly joint owners or tenants in common. They had, for instance, no right of partition. Their rights inter se were regulated by the agreement which they had made and by the Act of 1886, which was founded thereon. By the true construction and intention thereof the appellants' predecessors were only entitled to use the joint railway free of toll in respect of the lands and collieries which they possessed at the time of making the agreement, and which alone were within its contemplation; and the appellants themselves have no greater right than their predecessors. Those lands and collieries did not include the Killingworth Colliery. The consent of the respondents was necessary to entitle the appellants to make any junction of their branch with the joint railway except so far as they acted in pursuance of the powers conferred by s. 4, which were conditional upon their paying tolls as prescribed by s. 3: see *Durham and Sunderland Ry. Co.* v. *Wawn* (3); *London, Brighton, &c., Ry. Co.* v. *London and South Western Ry. Co.* (4)

Haldane, K.C., replied.

1901 June 13.

The judgment of their Lordships was delivered by

LORD JAMES OF HEREFORD. This is an appeal from a decree of the Chief Judge in Equity of the Colony of New South Wales. The question at issue arises out of the following facts.

The appellants and respondents are colliery companies, both possessing collieries in New South Wales. In the year 1886

(1) (1872) L. R. 5 H. L. 464.
(2) (1846) 2 Ph. 127.
(3) (1840) 3 Beav. 119.
(4) (1859) 4 De G. & J. 362.

the Wallsend Coal Company and the Monk Wearmouth Colliery Company were in possession of certain adjacent coal mines and land containing coal. These two companies desired to construct a railway to facilitate communication between their respective collieries and the Government railway, and they accordingly in the year 1886 entered into an agreement for the purpose of carrying out this object. It being necessary for the purpose of constructing the railway to acquire compulsory powers, an Act of the Parliament of New South Wales was obtained under which power was given to construct the railway in accordance with the terms contained in the agreement, which is set out in the schedule to the Act, and is as follows :—

"An agreement made this day of , A.D. one thousand eight hundred and eighty-six, between the West Wallsend Coal Company, Limited, of the one part, and the Monk Wearmouth Colliery Estate Company of Australia, Limited, of the other part.

"Witnesseth that, in consideration of the terms hereinafter expressed, the said companies have agreed to join in constructing a railway line from a point near the West Wallsend Coal Company's pit to the Sydney and Waratah Railway line, the cost of construction and purchase of land for the said line to run over and all the necessary expenses of laying the said railway line to be borne by the respective companies in equal shares, half cost of value of land belonging to West Wallsend over which railway passes to be paid by Monk Wearmouth. The cost of renewals and maintenances to the said railway line to be paid by each company or their transferees in proportion to the traffic done by each company or their transferees, and it is also agreed that should the Monk Wearmouth Colliery Estate Company of Australia, Limited, or their transferees so desire, they shall be at liberty to construct an extension of the said railway line from the said West Wallsend Coal Company pit to their collieries situated at Monk Wearmouth at the cost of the said Monk Wearmouth Colliery Estate Company. Provided always that the West Wallsend Coal Company, Limited, or their transferees, shall be at liberty to use the said extension

J. C. 1901 CALEDONIAN COAL COMPANY v. SEAHAM COLLIERY COMPANY.

by paying a proportionate part of the cost of renewals and maintenance to the extension according to the traffic done by the said West Wallsend Coal Company, Limited, or their transferees. And it is further agreed between the parties hereto that in case of any dispute arising as to the management and construction of the said line the same shall be referred to arbitration as provided for in the 'West Wallsend and Monk Wearmouth Railway Act of 1886.'"

The Act contained two sections which bore materially upon the question under consideration. The 3rd section enacted that the railway should be open to the public use upon payment of a toll to the two companies of a sum not exceeding 2*d.* per ton per mile in respect of every ton of goods carried for the public. The 4th section gave power to the owners and occupiers of lands traversed by the railway to lay down upon their own lands collateral branches of railway to communicate with the said railway, and enacted that the companies should, if required, at the expense of such owners or occupiers, make openings in the rails and such additional lines of railway as might be necessary for effecting such communication.

In pursuance of the agreement they had entered into the companies constructed the railway and worked it for some years. In 1894 the appellants acquired the interests of the Wallsend Company, and in 1897 the respondents became possessed of the interests of the Monk Wearmouth Company, and since that year the two companies have jointly used and managed the railway.

In the year 1896 the appellants acquired the Killingworth Colliery, a coal-bearing field adjoining the Wallsend Colliery, and commenced to work it, and so raised an additional quantity of coal. At the time of the purchase the Killingworth Company had partly constructed a branch line for the purpose of conveying coal on to the railway belonging to the two companies, and the appellants proceeded to complete the branch line and to carry it on so as to communicate with the companies' line. This communication was effected a few months before the commencement of this action.

The respondents forthwith made a claim under the 3rd

section of the Act, alleging that for the purposes of the traffic brought over the branch line the appellants must be regarded as being members of the public, and were therefore liable to pay a toll of 2*d.* per ton per mile for the coal coming from the Killingworth Colliery carried on the joint line.

In the Court below judgment was given in favour of this claim, and the appeal from such judgment now comes before their Lordships.

Both in the Court below and on the hearing of the appeal it was contended on the part of the plaintiffs in the action (the present respondents) that in constructing the branch railway, and when carrying the coals brought by such branch railway on the jointly constructed line, the appellants must be regarded as one of the public and must pay the toll mentioned in clause 3 of the Act.

But their Lordships are of opinion that the contention is erroneous and cannot be maintained.

The appellants and respondents are joint owners and occupiers of the railway line constructed under the agreement. That line was intended to be used for the purpose of carrying the coal of those who are now represented by the appellants and respondents. No limitation as to the quantity of coal to be carried or the collieries from which it is to be derived can be found in the statute or in the scheduled agreement. The recital in the preamble to the Act does not appear to constitute any such limitation. It is true that the opening of branch lines at the will of one of the parties to the agreement would probably cause such company to be obtaining a greater advantage from the joint line than that enjoyed by the other company. But the parties to the agreement seemed to contemplate that this inequality of user might exist.

There is no reference to an equal use of the line either in the Act or agreement, and the latter document recognises an unequal use by the insertion of the term "the cost of renewals and maintenances to the said railway line to be paid by each company or their transferees in proportion to the traffic done by each company." Greater proportionate traffic would thus throw greater expenditure upon either company, and so to

J.C. 1901

CALEDONIAN COAL COMPANY v. SEAHAM COLLIERY COMPANY.

a very considerable extent regulate the adjustment between benefit and cost.

It is worthy of notice that the appellant company appears to have constructed the branch line in question and brought it into communication with the original line independently and without applying to the joint companies to make openings in the latter line and paying the expense incurred thereby. Under clause 4 of the Act such application and payment would have to be made if the branch line had been made by one of the public.

It seems to their Lordships that the bringing the branch line into communication with the main line and the carrying of the appellants' coal upon the latter were acts lawfully done; and being in accordance with the intention and purpose of both of the parties to the agreement, there is nothing approaching an ouster of one of the joint occupiers of the line by the other.

For these reasons their Lordships are of opinion that the decree made in the suit cannot be maintained, and should be reversed and the suit dismissed with costs, and their Lordships will humbly advise His Majesty accordingly. The respondents will pay the costs of this appeal.

Solicitors for appellants: *Linklater, Addison, Brown & Jones.*

Solicitors for respondents: *Stephen & Slade.*

[PRIVY COUNCIL.]

NIREAHA TAMAKI . . . . . PLAINTIFF;

AND

BAKER . . . . . DEFENDANT.

J. C.*
1900
May 9, 16.
1901
May 11.

ON APPEAL FROM THE COURT OF APPEAL OF NEW ZEALAND.

Law of New Zealand—Native Title to Possession of Land—Land Act of 1892, *ss.* 136, 137—*Jurisdiction as to Cession to the Crown—Native Rights Act* 1865, *ss.* 3, 4, 5.

The Civil Courts have jurisdiction under the Native Rights Act, 1865, ss. 3, 4, 5, to ascertain as therein provided native title to and interest in land according to custom or usage of the Maori people. And they are bound in any action in which such title is involved to recognise the rightful possession and occupation of lands by the natives until lawfully extinguished, and to give effect to it.

The appellant having alleged a native title of occupancy to the lands in suit in a manner which was consistent with the Crown's seisin thereof in fee:—

Held, that his suit to restrain an unauthorized invasion of it was maintainable, and that the Court had jurisdiction to decide at least that the title alleged was in existence and had not been extinguished by cession to the Crown in manner provided by statute, or by other proceeding legally effective for that purpose.

Wi Parata v. *Bishop of Wellington*, 3 N. Z. J. R. (N.S.) S. C. 72, considered.

Quære, whether native title can be extinguished by an exercise of the prerogative.

The respondent as Commissioner of Crown Lands having notified the land in suit under s. 136 of the Land Act of 1892, offered it for sale or selection in terms of s. 137, and advertised the sale thereof:—

Held, that the appellant was entitled to sue for an injunction until his title was extinguished according to law, and the Court had jurisdiction to decide whether the respondent's action was within his statutory powers.

APPEAL from a judgment of the Court of Appeal (May 28, 1894) upon certain points of law which had been ordered to be argued before the trial of the action. The case is reported in 12 N. Z. L. R. 483.

* *Present:* THE LORD CHANCELLOR, LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, and SIR HENRY DE VILLIERS.

J. C.
1901
NIREAHA TAMAKI
v.
BAKER.

The appellant is an aboriginal native and a member of the Rangitane tribe of Maories. The respondent is the Commissioner of Crown Lands in the provincial district of Wellington appointed under the Land Act, 1892.

The subject-matter of the action was the title to a certain triangular block of land containing about 5184 acres, and a further piece of land between the southern boundary thereof and the Makahaki river which the appellant claimed to be either lands owned by the natives under their customs and usages, or lands belonging to his tribe under an order dated September 13, 1871 (set out in their Lordships' judgment), of the Native Land Court, but which the respondent contended were vested in Her Majesty the Queen.

Upon the settlement of the Colony in the year 1840, a treaty, known as the Treaty of Waitangi, and set out in their Lordships' judgment, was entered into by Lieutenant-Governor Hobson and a number of the native chiefs, by which the latter ceded to Her Majesty all their rights and powers of sovereignty, and Her Majesty confirmed and guaranteed to the chiefs and tribes of New Zealand and to the respective families and individuals thereof the full, exclusive, and undisturbed possession of their lands, estates, forests, fisheries, and other properties which they might collectively or individually possess so long as it was their wish and desire to retain the same in their possession; but the chiefs yielded to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof might be disposed to alienate at such prices as might be agreed between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

The Governor having on July 7, 1893, notified in the *Gazette*, under s. 136 of the Land Act, 1892, that a block of land which included the land in dispute in this action was open for sale or selection, subsequently advertised the same for that purpose as second class unsurveyed rural land. The appellant thereupon sued for a declaration that the same still remained land owned by natives under their customs and usage, whether under the aforesaid order of September 13, 1871, or otherwise, and for an injunction against selling or advertising the same.

The respondent by his defence raised (inter alia) objections to the jurisdiction of the Supreme Court of New Zealand to try the matter put in issue by these proceedings, and by consent certain issues of law were formulated and submitted for decision. The third and fourth issues were as follows:—

(3.) Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding?

(4.) Has the Court jurisdiction to inquire whether as a matter of fact the land in dispute herein has been ceded by the native owners to the Crown?

At the hearing of those issues it was admitted that the Attorney-General should have been made a defendant, and it was agreed that the questions should be argued and determined as though he had been made a party and had raised the defences raised by the respondent.

The Court held that, so far as the plaintiff based his title on the order of September 13, 1871, the fact that no survey had ever been deposited in pursuance of such order was fatal to his claim, which consequently rested on a pure Maori title of occupancy; and that the case accordingly fell within the direct authority of *Wi Parata* v. *Bishop of Wellington* (1), according to which the assertion of the claim of the Crown was sufficient to oust the jurisdiction of that or any other Court in the Colony to try a claim which rested on such a title. "There can be no known rule of law," it said, "by which the validity of dealings in the name and under the authority of the Sovereign with the native tribes of this country for the extinction of their territorial rights can be tested. Such transactions began with the settlement of these islands: so that native custom is inapplicable to them. The Crown is under a solemn engagement to observe strict justice in the matter, but of necessity it must be left to the conscience of the Crown to determine what is justice. The security of all titles in the country depends on the maintenance of this principle."

The course of legislation bearing upon the questions decided in this appeal is stated in their Lordships' judgment.

(1) 3 N. Z. J. R. (N.S.) S. C. 72.

J. C. 1901 NIREAHA TAMAKI v. BAKER.

Cohen, Q.C., and *J. W. Gordon*, for the appellant, contended that the assertion of a claim by the Crown was not sufficient to oust the jurisdiction of the Courts. The decision of the matters in controversy in this suit does not involve any question of prerogative or of the validity of any act of the Crown. The real point at issue is the authority of the respondent to notify and advertise for sale or selection the land in suit. The respondent is an executive officer of the Crown, whose authority is limited and defined by statute. The question is whether he has exceeded his authority, and its decision turns on the construction of statutes and other documents from which his authority is alleged to be derived. He has no power to exercise the prerogative, or by any act of his to extinguish the native title to the lands in suit. Nor has the Crown through any other agent dealt with the appellant or with any other natives for the extinction of their title, whether the aboriginal title or the title as judicially ascertained. The Court has and must have jurisdiction to decide the main issue in this suit—whether the respondent's acts are acts of usurpation done without any warrant of authority. The prerogative title of the Crown is not attacked. The native title, that of possession and occupancy, coexists with and is based upon the Crown title. The case of *Wi Parata* v. *Bishop of Wellington* (1), on which the Court of Appeal founded its judgment, has no application. The respondent founded his claim to take the proceedings complained of upon s. 136 of the Land Act, 1892. The question of prerogative does not arise. The appellant is entitled to question, and the Court has jurisdiction to decide, the legality of the respondent's acts, whether they were duly authorized by ss. 136 and 137 of the Land Act, 1892, which depends upon the true construction of those sections, the true effect of the circumstances which led to his acts, and the nature and regularity of those acts: see *Tobin* v. *Reg.* (2) The questions raised by this suit are all within the cognizance of a Court of Law; there is no act complained of which can properly be regarded as an act of State; the act complained of is one done by a servant of the Crown in the supposed performance of his duty.

(1) 3 N. Z. J. R. (N.S.) S. C. 72. (2) (1864) 16 C. B. (N.S.) 310, 359.

Blake, Q.C., and *G. R. Northcote*, contended that the Court had no jurisdiction to entertain or decide this suit. The Crown has the sole right, as invariably held by the Courts of the Colony, of determining whether the interests of the natives in any lands had or had not been ceded to the Crown. Any declaration by the Crown to that effect, or any proceeding of the Crown, such as the proceeding complained of in this suit, implying such a determination, was conclusive of the fact and could not be reviewed by a Court of Law. This view, moreover, has been adopted by the Legislature in several Acts: see Native Lands Act, 1867, s. 10; Native Land Act, 1873, s. 105; Land Act, 1885, s. 247; Land Act, 1892, s. 250. All transactions with the natives for the cession of their rights in any lands to the Crown are acts of State. The right of determining when the title of natives to any lands has been extinguished is a prerogative right of the Crown. The assertion by the Crown of its title to the lands in suit as Crown lands involves an exercise of that prerogative right, and cannot be called in question in any Court. Reference was made to *Cook* v. *Sprigg*. (1) A case of *Reg.* v. *Symonds* was also referred to as reported in Parliamentary Paper, December, 1847, relative to the affairs of New Zealand, p. 64. It was a case as to the legality of the course pursued by Sir G. Grey's predecessor in waiving the Crown's right of pre-emption from the natives over large tracts of lands in favour of specified individuals, and it decided that such waiver was illegal and void, and that the persons specified acquired no legal right by such waiver. The view adopted by the Legislature and the Courts, that it is for the Crown alone to decide whether the title of natives to lands in the Colony has or has not been extinguished, has become the foundation of all titles to land in the Colony, and it would be unjust and contrary to principle that that view, even if erroneous, should now be upset. Notwithstanding the complicated proceedings in this case the issue is very simple, whether there is a right to sue the Crown and a jurisdiction to entertain the suit; and under all the circumstances it should be held that the appellant was not entitled to sue to have it

(1) [1899] A. C. 572.

J. C. 1901 NIREAHA TAMAKI v. BAKER.

declared that what was practically an act of the Crown and of the State was unauthorized: see *Wi Parata* v. *Bishop of Wellington*. (1) Reference was also made to *Cherokee Nation* v. *State of Georgia* (2); *Worcester* v. *State of Georgia* (3); *Fletcher* v. *Peck* (4); *Johnson* v. *Mackintosh*. (5)

Cohen, Q.C., replied, citing *Reg.* v. *Hughes* (6), *Rogers* v. *Rajendro Dutt* (7).

1901 *May* 11.

The judgment of their Lordships was delivered by

LORD DAVEY. This is an appeal by an aboriginal inhabitant of New Zealand against an order of the Court of Appeal in that Colony, dated May 28, 1894, in which questions of great moment affecting the status and civil rights of the aboriginal subjects of the Crown have been raised by the respondent. In order to make these questions intelligible it will be necessary to review shortly the course of legislation on the subject in the Colony.

The Treaty of Waitangi (February 6, 1840) is in the following words:—

"*Article the First.*

"The Chiefs of the Confederation of the United Tribes of New Zealand, and the separate and independent Chiefs who have not become members of the Confederation, cede to Her Majesty the Queen of England, absolutely and without reservation, all the rights and powers of Sovereignty which the said Confederation or Individual Chiefs respectively exercise or possess, or may be supposed to exercise or to possess, over their respective territories as the sole sovereigns thereof.

"*Article the Second.*

"Her Majesty the Queen of England confirms and guarantees to the Chiefs and Tribes of New Zealand, and to the respective families and individuals thereof, the full, exclusive, and undisturbed possession of their Lands and Estates, Forests, Fisheries,

(1) 3 N. Z. J. R. (N.S.) S. C. 72.
(2) (1831) 5 Peters, U. S. 1.
(3) (1832) 6 Peters, U. S. 515.
(4) (1810) 6 Cranch, 87.
(5) (1823) 8 Wheaton, 543.
(6) (1865) L. R. 1 P. C. 81.
(7) (1860) 13 Moo. P. C. 209.

and other properties which they may collectively or individually possess, so long as it is their wish and desire to retain the same in their possession; but the Chiefs of the United Tribes and the individual Chiefs yield to Her Majesty the exclusive right of pre-emption over such lands as the proprietors thereof may be disposed to alienate, at such prices as may be agreed upon between the respective proprietors and persons appointed by Her Majesty to treat with them in that behalf.

"*Article the Third.*

"In consideration thereof, Her Majesty the Queen of England extends to the Natives of New Zealand Her Royal protection, and imparts to them all the rights and privileges of British subjects."

By the 2nd section of the Land Claims Ordinance of 1841 (repealing the New South Wales Act, 4 Vict. No. 7) it was—

"Declared enacted and ordained that all unappropriated lands within the Colony of New Zealand, subject however to the rightful and necessary occupation and use thereof by the aboriginal inhabitants of the said Colony—are and remain Crown or domain lands of Her Majesty Her heirs and Successors and that the sole and absolute right of pre-emption from the said aboriginal inhabitants vests in and can only be exercised by Her said Majesty Her Heirs and Successors."

No doubt this Act of the Legislature did not confer title on the Crown, but it declares the title of the Crown to be subject to the "rightful and necessary occupation" of the aboriginal inhabitants, and was to that extent a legislative recognition of the rights confirmed and guaranteed by the Crown by the second article of the Treaty of Waitangi. It would not of itself, however, be sufficient to create a right in the native occupiers cognizable in a Court of Law.

In the year 1852 New Zealand, which up to that time had been a part of New South Wales, received a constitution as a self-governing Colony. By the New Zealand Constitution Act of that year (15 & 16 Vict. c. 72), s. 72, the Assembly was empowered to make laws for the sale, disposal, and occupation of waste lands of the Crown and lands wherein the title of

J. C. 1901 NIREAHA TAMAKI v. BAKER.

natives shall be extinguished as thereafter mentioned, and (s. 73) it was made unlawful for any person other than Her Majesty to purchase or accept from aboriginal natives land of or belonging to or used by them in common as tribes or communities, or to accept any release or extinguishment of the rights of such aboriginal natives in any such land. By s. 8 of 25 & 26 Vict. c. 48, power was given to the General Assembly to repeal s. 73 of the previous Act.

By the Native Rights Act, 1865, of the Colonial Legislature (29 Vict. No. 11), it was enacted (s. 2) that every person of the Maori race within the Colony of New Zealand, whether born before or since New Zealand became a dependency of Great Britain, should be taken and deemed to be a natural-born subject of Her Majesty to all intents and purposes whatsoever; (s. 3) that the Supreme Court and all other Courts of Law within the Colony ought to have and have the same jurisdiction in all cases touching the persons and the property whether real or personal of the Maori people, and touching the titles to land held under Maori custom or usage, as they have or may have under any law for the time being in force in all cases touching the persons and property of natural-born subjects of Her Majesty; (s. 4) that every title to and interest in land over which the native title shall not have been extinguished shall be determined according to the ancient custom or usage of the Maori people so far as the same can be ascertained. And (s. 5) that in any action involving the title to or interest in any such land, the judge before whom the same shall be tried shall direct issues for trial before the Native Land Court.

By the Native Lands Act, 1865 (29 Vict. No. 71), after a recital that it was expedient to amend and consolidate the laws relating to lands in the Colony which were still subject to Maori proprietary customs, and to provide for the ascertainment of the persons who according to such customs were the owners thereof, and to encourage the extinction of such proprietary customs, and to provide for the conversion of such modes of ownership into titles derived from the Crown and for other purposes therein mentioned, it was enacted (s. 2) that "native land" should mean lands in the Colony which were owned by

natives under their customs or usages; (s. 5) that the Native Land Court (which had been established under earlier legislation) should be a Court of Record for, amongst other purposes, the investigation of the titles of persons to native lands; (s. 21) that any native claiming to be interested in a piece of native land might apply for the investigation of his claim by the Court in order that a title from the Crown might be issued to him; (s. 23) that the Court (after certain notices had been given) should ascertain the right, title, or interest of the applicant and all other claimants to or in the land in question, and order a certificate of title to be issued specifying the names of the persons or of the tribe who, according to native custom, own or were interested in the land, describing the nature of such estate or interest and describing the land comprised in such certificate. By s. 25 it was provided that no order for a certificate of title should be made unless a survey of the lands in question made by a duly licensed surveyor was produced during the investigation, and it should be proved that the boundaries had been distinctly marked out on the ground. It is from the neglect of this very useful provision that the whole difficulty of fact has arisen in the present litigation. By ss. 46 to 48 provision is made for the issue of Crown grants to the persons mentioned in any certificates and to purchasers from them, which latter grants were to be as valid and effectual as if the lands had been ceded by "the native proprietors" to Her Majesty.

By the Native Land Act, 1877 (41 Vict. No. 91), s. 6, power was given to the Native Minister to apply to the Native Land Court to ascertain and determine what interest in any plot of land had been acquired by or on behalf of Her Majesty, and all lands declared in any order made on such application to have been so acquired should from the date of the order be deemed to be absolutely vested in Her Majesty. This section has been repealed, but is re-enacted in a subsequent Act.

The Native Land Act, 1865, has been repealed by the Native Land Act, 1873, but was in force at the date of the orders made by the Native Land Court on September 13, 1871, hereafter mentioned. The provisions of the earlier Act with some

J. C. 1901

NIREAHA TAMAKI v. BAKER.

alterations and additions were re-enacted in the Act of 1873. The only sections to which reference need be made for the present purpose are ss. 101 and 102, by which the Native Land Court is directed to hear and determine any reference from the Supreme Court under the Native Rights Act, 1865, and the effect of the decision of the Land Court thereon is defined, and s. 105, by which it is enacted that any notification published in the *New Zealand Gazette*, and purporting to be made by or by the authority of the Governor, and stating that the native title over any land therein described was extinguished previously to a date therein specified, shall for all purposes be received as conclusive proof that the native title over the land described in such notice was extinguished at some time previously to the date therein specified, and that such land on such date ceased to be native land within the meaning of the Act.

Their Lordships do not think it necessary to review the series of Land Acts which were passed prior to 1892 for the purpose of enabling the Government to sell and dispose of Crown lands discharged from native claims. The Act in force at the commencement of the present action was the Land Act of 1892, No. 37. By s. 3 of that Act Crown lands are defined to mean and include (amongst other things)—

"All native lands which have been ceded to Her Majesty by the natives, or have been purchased or otherwise acquired in freehold from the natives on behalf of Her Majesty, or have become vested in Her Majesty by right of Her prerogative."

By ss. 22 and 26 provision was made for the constitution of ten land districts (of which the Wellington Land District is one) with a Commissioner of Crown Lands for each district, and by s. 28 the powers and duties of the Commissioners were defined. By s. 106 Crown lands were divided into three classes: (1.) town land, (2.) suburban land, and (3.) rural land. By s. 136 the Governor was empowered by notification in the *Gazette* to declare that any rural land within the Colony (with an immaterial exception) should be open for sale or selection in the manner and upon the conditions mentioned in the Act. By s. 250 it is enacted that whenever the Governor is satisfied that any native lands acquired by Her Majesty in any way or

purchased out of moneys authorized to be expended on purchase of lands in the North Island are free from native claims and any difficulties in connection therewith, he shall by proclamation ordain such lands to be Crown lands subject to be sold and disposed of; and thereupon such lands so proclaimed shall become subject to the provisions of the laws in force regulating the sale and disposal of Crown lands.

On September 13, 1871, three orders were made by the judge of the Native Land Court.

The first order was for the issue of a certificate of title under the Native Land Acts, 1865 and 1869, to certain natives (not including the appellant) in respect of a block of land containing about 22,000 acres, known as and called Kaihinu No. 1, when a proper survey of the said land should have been furnished to the satisfaction of the Chief Judge. And it was further ordered that, whenever a Crown grant should be made of the said land, the legal estate therein should vest in the grantees on September 13, 1871.

The second was a similar order in all respects as to a block of land containing about 19,000 acres, and called Kaihinu No. 2, in favour of certain natives (also not including the appellant).

The third was again a similar order in all respects as to a block of land containing 62,000 acres, and called Mangatainoka Block, in favour of certain natives (including the appellant) and all others (if any) of the members of the Rangitane tribe. By subsequent proceedings certain parts of this block (not including the areas in dispute) have been detached, and have been ceded to the Crown.

By a deed dated October 10, 1871, various blocks of land (including Kaihinu No. 1 and Kaihinu No. 2, but not including the Mangatainoka Block) were surrendered by the natives interested to the Crown. The boundaries of these blocks were not mentioned in this deed, but there is a plan on the deed the accuracy and effect of which are in controversy.

By a proclamation dated July 2, 1874, the then Governor of the Colony, "being satisfied that the lands described in the schedule hereto are free from native claims, and all difficulties

J. C. 1901 NIREAHA TAMAKI v. BAKER.

in connection therewith, in pursuance and exercise of the power and authority vested in me by the Immigration and Public Works Act, 1873," proclaimed the said lands to be waste lands of the Crown, subject to be sold and dealt with in accordance with the provisions of the laws in force. The schedule includes all the blocks of land ceded by the deed of October 10, 1871, as the same are particularly delineated on the plan drawn in the margin of the deed.

On July 13, 1893, the respondent by public notice offered a block of land called Kaiparoro, 20,000 acres in extent, and containing portions of Kaihinu No. 1 and Kaihinu No. 2, and part of an area of 5184 acres, the title to which is in dispute in this action, for sale or selection "in terms of s. 137 of the Land Act, 1892," and he subsequently advertised the intended sale in the local newspapers. It is stated in the respondent's case in this appeal that a previous notification was made by the Governor pursuant to s. 136 of the Act of 1892, and published in the *Gazette*, declaring open for sale the block called Kaiparoo, but there is no mention of such document in the statement of claim or the defence, and it is not referred to in the judgment of the Court, nor does it appear to their Lordships to be material to the questions which they have to decide on this appeal.

The appellant thereupon commenced the present action. The allegations in the amended statement of claim are confused, and some of them are irrelevant, and the prayer certainly goes beyond any relief which, in the most favourable view of his case, he can be entitled to. He sets out the several documents the effect of which has been already stated. He does not in terms allege his title to block Mangatainoka, or that he and the other members of his tribe are enjoying the use and occupation of the lands in dispute, but he sets out the order relating to that block, and in paragraph 36 alleges that no licence has been granted to any other person to occupy the lands in dispute. Their Lordships think that for the present purpose they are not bound to scan the sufficiency of the allegations too closely, and they must assume that the appellant has alleged, or can by amendment allege, a

sufficient title of occupancy in himself and the other members of his tribe to raise the questions in controversy on this appeal.

The substance of the appellant's case appears to be that no proper or sufficient surveys of blocks Kaihinu No. 1, Kaihinu No. 2, or Mangatainoka have ever been made, and that the respective boundaries between the last two blocks have never been ascertained, and that a certain triangular block of 5184 acres and another piece of land are not parts of Kaihinu No. 2 (as claimed by the respondent), but parts of Mangatainoka, and that the native title in those portions of the last-named block has never been extinguished by cession to the Crown or otherwise. By paragraph 36 of the statement of claim the appellant submits that the said triangular piece of land and the other piece of land still remain land owned by himself and other aboriginal natives under their customs and usages, whether under the said order of the Native Land Court or otherwise. His prayer is :—

1. For a declaration in the terms of his previous submission.

2. That the pieces of land form part of the Mangatainoka Block.

3. For a perpetual injunction to restrain the respondent from selling the two pieces of land, or from advertising the same for sale or disposal, as being the property of the Crown, and for further relief.

Their Lordships observe that the order of the Land Court, not being completed by a certificate, does not confer any title on the appellant, but they think it is evidence of his title, and the Act does not appear to make the obtaining of the certificate a condition precedent to the assertion of a native title. In fact, no certificates were issued in respect of blocks Kaihinu No. 1 and Kaihinu No. 2.

The issue of fact between the parties is, whether the pieces of land in question were parts of Kaihinu No. 2 or of Mangatainoka. But if the action comes to trial there will be another question, whether the pieces of land have in fact, even if erroneously, been included in the deed of cession of Kaihinu No. 2, or in some proclamation or other act of the Governor,

J. C. 1901

NIREAHA TAMAKI v. BAKER.

which by the Acts in force is made conclusive evidence against the appellant.

Their Lordships, however, have not now to deal with the merits of the case, or to say whether the appellant has or ever had any title to the pieces of land in question, or whether such title (if any) has or has not been duly extinguished, or to express any opinion on the regularity or otherwise of the respondent's proceedings. The respondent has pleaded, amongst other pleas, that the Court has no jurisdiction in this proceeding to inquire into the validity of the vesting or the non-vesting of the said lands, or any part thereof, in the Crown.

An order was made for the trial of four preliminary issues of law, of which two only (the 3rd and 4th) were dealt with in the order now under appeal. They are in these terms :—

"3. Can the interest of the Crown in the subject-matter of this suit be attacked by this proceeding?

"4. Has the Court jurisdiction to inquire whether, as a matter of fact, the land in dispute has been ceded by the native owners to the Crown?" Both questions were answered by the Court of Appeal in the negative.

Their Lordships are somewhat embarrassed by the form in which the third question is stated. If it refers to the prerogative title of the Crown, the answer seems to be that that title is not attacked, the native title of possession and occupancy not being inconsistent with the seisin in fee of the Crown. Indeed, by asserting his native title, the appellant impliedly asserts and relies on the radical title of the Crown as the basis of his own title of occupancy or possession. If, on the other hand, the unincumbered title alleged by the respondent to have been acquired by the Crown by extinguishment of the native title be referred to, it is the same question as No. 4, and the answer to it must depend on a consideration of the character of the action and the nature of the relief prayed against the defendant. As the Court of Appeal point out, what they had to determine was in the nature of a demurrer to the statement of claim. The substantial question, therefore, is whether the appellant can sue, and whether, if the allegations in the statement of claim are proved, he will be entitled to some relief

against the respondent. It is not necessary for him to shew in this proceeding that he will be entitled to all the relief which he seeks.

The learned judges in the Court of Appeal thought that the case was within the direct authority of *Wi Parata* v. *Bishop of Wellington* (1), previously decided in that Court. They held that "the mere assertion of the claim of the Crown is in itself sufficient to oust the jurisdiction of this or any other Court in the Colony. There can be no known rule of law," they add, "by which the validity of dealings in the name and under the authority of the Sovereign with the native tribes of this country for the extinction of their territorial rights can be tested." The argument on behalf of the respondent at their Lordships' bar proceeded on the same lines.

Their Lordships think that the learned judges have misapprehended the true object and scope of the action, and that the fallacy of their judgment is to treat the respondent as if he were the Crown, or acting under the authority of the Crown for the purpose of this action. The object of the action is to restrain the respondent from infringing the appellant's rights by selling property on which he alleges an interest in assumed pursuance of a statutory authority, the conditions of which, it is alleged, have not been complied with. The respondent's authority to sell on behalf of the Crown is derived solely from the statutes, and is confined within the four corners of the statutes. The Governor, in notifying that the lands were rural land open for sale, was acting, and stated himself to be acting, in pursuance of the 136th section of the Land Act, 1892, and the respondent in his notice of sale purports to sell in terms of s. 137 of the same Act. If the land were not within the powers of those sections, as is alleged by the appellant, the respondent had no power to sell the lands, and his threat to do so was an unauthorized invasion of the appellant's alleged rights.

In the case of *Tobin* v. *Reg.* (2), a naval officer, purporting to act in pursuance of a statutory authority, wrongly seized a ship of the suppliant. It was held on demurrer to a petition

(1) 3 N. Z. J. R. (N.S.) S. C. 72. (2) 16 C. B. (N.S.) 310.

J. C. 1901

NIREAHA TAMAKI v. BAKER.

of right that the statement of the suppliant shewed a wrong for which an action might lie against the officer, but did not shew a complaint in respect of which a petition of right could be maintained against the Queen, on the ground, amongst others, that the officer in seizing the vessel was not acting in obedience to a command of Her Majesty, but in the supposed performance of a duty imposed upon him by Act of Parliament, and in such a case the maxim "Respondeat superior" did not apply. On the same general principle it was held in *Musgrave* v. *Pulido* (1) that a Governor of a Colony cannot defend himself in an action of trespass for wrongly seizing the plaintiff's goods merely by averring that the acts complained of were done by him as "Governor" or as "acts of State." It is unnecessary to multiply authorities for so plain a proposition, and one so necessary to the protection of the subject. Their Lordships hold that an aggrieved person may sue an officer of the Crown to restrain a threatened act purporting to be done in supposed pursuance of an Act of Parliament, but really outside the statutory authority. The Court of Appeal thought that the Attorney-General was a necessary party to the action; but it follows, from what their Lordships have said as to the character of the action, that in their opinion he was neither a necessary nor a proper party. In a constitutional country the assertion of title by the Attorney-General in a Court of Justice can be treated as pleading only, and requires to be supported by evidence.

But it is argued that the Court has no jurisdiction to decide whether the native title has or has not been extinguished by cession to the Crown. It is said, and not denied, that the Crown has an exclusive right of pre-emption over native lands and of extinguishing the native title. But that right is now exercised by the constitutional Ministers of the Crown on behalf of the public in accordance with the provisions of the statutes in that behalf, and there is no suggestion of the extinction of the appellant's title by the exercise of the prerogative outside the statutes if such a right still exists. There does not seem to be any greater difficulty in deciding whether

(1) (1879) 5 App. Cas. 102.

the provisions of an Act of Parliament have been complied with in this case than in any other, or any reason why the Court should not do so. In so saying their Lordships assume, without deciding, that if it be shewn that by an act of the Governor done pursuant to the statutes the land has been declared free from native claims, it will be conclusive on the appellant.

A more formidable objection to the jurisdiction is that no suit can be brought upon a native title. And the first paragraph of the prayer was referred to as shewing that the appellant sought a declaration of his title as against the Crown. Their Lordships, however, do not understand that paragraph to mean more than that the native title has not been extinguished according to law. The right, it was said, depends on the grace and favour of the Crown declared in the Treaty of Waitangi, and the Court has no jurisdiction to enforce it or entertain any question about it. Indeed, it was said in the case of *Wi Parata* v. *Bishop of Wellington* (1), which was followed by the Court of Appeal in this case, that there is no customary law of the Maoris of which the Courts of Law can take cognizance. Their Lordships think that this argument goes too far, and that it is rather late in the day for such an argument to be addressed to a New Zealand Court. It does not seem possible to get rid of the express words of the 3rd and 4th sections of the Native Rights Act, 1865, by saying (as the Chief Justice said in the case referred to) that "a phrase in a statute cannot call what is non-existent into being." It is the duty of the Courts to interpret the statute which plainly assumes the existence of a tenure of land under custom and usage which is either known to lawyers or discoverable by them by evidence. By the 5th section it is plainly contemplated that cases might arise in the Supreme Court in which the title or some interest in native land is involved, and in that case provision is made for the investigation of such titles and the ascertainment of such interests being remitted to a Court specially constituted for the purpose. The legislation both of the Imperial Parliament and of the Colonial Legislature is consistent with this view of the construction and effect of the Native Rights Act;

(1) 3 N. Z. J. R. (N.S.) S. C. 72.

J. C. 1901 NIREAHA TAMAKI v. BAKER.

and one is rather at a loss to know what is meant by such expressions "native title," "native lands," "owners," and "proprietors," or the careful provision against sale of Crown lands until the native title has been extinguished, if there be no such title cognizable by the law, and no title therefore to be extinguished. Their Lordships think that the Supreme Court are bound to recognise the fact of the "rightful possession and occupation of the natives" until extinguished in accordance with law in any action in which such title is involved, and (as has been seen) means are provided for the ascertainment of such a title. The Court is not called upon in the present case to ascertain or define as against the Crown the exact nature or incidents of such title, but merely to say whether it exists or existed as a matter of fact, and whether it has been extinguished according to law. If necessary for the ascertainment of the appellant's alleged rights, the Supreme Court must seek the assistance of the Native Land Court; but that circumstance does not appear to their Lordships an objection to the Supreme Court entertaining the appellant's action. Their Lordships, therefore, think that, if the appellant can succeed in proving that he and the members of his tribe are in possession and occupation of the lands in dispute under a native title which has not been lawfully extinguished, he can maintain this action to restrain an unauthorized invasion of his title. The question whether the appellant should sue alone or on behalf of himself and the other members of his tribe on an allegation that they are too numerous to be conveniently made co-plaintiffs is not now before their Lordships, but it does not seem to present any serious difficulty.

If all that is meant by the respondent's argument is that in a question between the appellant and the Crown itself the appellant cannot sue upon his native title, there may be difficulties in his way (whether insurmountable or not it is unnecessary to say); but for the reasons already given that question, in the opinion of their Lordships, does not arise in the present case.

In the case of *Wi Parata* v. *Bishop of Wellington* (1),

(1) 3 N. Z. J. R. (N.S.) S. C. 72.

already referred to, the decision was that the Court has no jurisdiction by scire facias or other proceeding to annul a Crown grant for matter not appearing on the face of it, and it was held that the issue of a Crown grant implies a declaration by the Crown that the native title has been extinguished. If so, it is all the more important that natives should be able to protect their rights (whatever they are) before the land is sold and granted to a purchaser. But the dicta in the case go beyond what was necessary for the decision. Their Lordships have already commented on the limited construction and effect attributed to the 3rd section of the Native Rights Act, 1865, by the Chief Justice in that case. As applied to the case then before the Court, however, their Lordships see no reason to doubt the correctness of the conclusion arrived at by the learned judges.

In an earlier case of *Reg.* v. *Symonds* (1) it was held that a grantee from the Crown had a superior right to a purchaser from the natives without authority or confirmation from the Crown, which seems to follow from the right of pre-emption vested in the Crown. In the course of his judgment, however, Chapman J. made some observations very pertinent to the present case. He says: "Whatever may be the opinion of jurists as to the strength or weakness of the native title, it cannot be too solemnly asserted that it is entitled to be respected, that it cannot be extinguished (at least in times of peace) otherwise than by the free consent of the native occupiers." And while affirming "the Queen's exclusive right to extinguish it" secured by the right of pre-emption reserved to the Crown, he holds that it cannot be extinguished otherwise than in strict compliance with the provisions of the statutes.

Certain American decisions (2) were quoted in the course of the argument. It appears from the cases referred to, and others which have been consulted by their Lordships, that the nature of the Indian title is not the same in the different States,

(1) Parliamentary Papers relative to the affairs of New Zealand, Dec., 1847, p. 67.

(2) *Cherokee Nation* v. *State of Georgia*, 5 Peters, U. S. 1; *Worcester* v. *State of Georgia*, 6 Peters, U. S. 515; *Fletcher* v. *Peck*, 6 Cranch, 87; *Johnson* v. *Mackintosh*, 8 Wheaton, 543.

J. C. 1901 NIREAHA TAMAKI v. BAKER.

and where the European settlement has its origin in discovery and not in conquest different considerations apply. The judgments of Marshall C.J. are entitled to the greatest respect, although not binding on a British Court. The decisions referred to, however, being given under different circumstances, do not appear to assist their Lordships in this case. But some of the judgments contain dicta not unfavourable to the appellant's case.

Their Lordships are, therefore, of opinion that the order of the Court of Appeal should be reversed, and a declaration should be made in answer to the third and fourth issues of law as follows: That it not appearing that the estate and interest of the Crown in the subject-matter of this suit, subject to such native titles (if any) as have not been extinguished in accordance with law, are being attacked by this proceeding, the Court has jurisdiction to inquire whether as a matter of fact the land in dispute has been ceded by the native owners to the Crown in accordance with law, and the respondent should be ordered to pay the costs of the hearing before the Court of Appeal, and they will humbly advise His Majesty accordingly.

Their Lordships observe that the declaration asked for by the statement of claim is too wide in its terms, and if the appellant succeeds in the action he can at the most be entitled to a declaration that the native title in the lands in dispute has not been, or is not shewn by the respondent to have been, duly extinguished according to law (which is probably what is meant), and the injunction asked for should be limited by omitting the word "perpetual" and inserting "until the native title in the said lands has been duly extinguished according to law," or some similar words. Their Lordships, of course, say nothing as to the other defences, and express no opinion on the question which was mooted in the course of the argument, whether the native title could be extinguished by the exercise of the prerogative, which does not arise in the present case.

By the Order in Council of July 8, 1895, leave is given to the appellant to appeal from the judgment of the Court of Appeal of July 13, 1894. It is not denied by the respondent, and the appeal has been argued on the assumption on both

sides, that the order of May 28, 1894, was intended, and that leave to appeal from that order was intended to be given. Their Lordships, therefore, will humbly advise His Majesty that the Order in Council should be read and have effect as if the words "the judgment of the Court of Appeal of New Zealand of May 28, 1894," were substituted therein instead of the words "the said judgment of the Court of Appeal of New Zealand of July 13, 1894."

J. C. 1901 NIREAHA TAMAKI v. BAKER.

The respondent will pay the costs of this appeal.

Solicitors for appellant: *Hollams, Sons, Coward & Hawksley.*
Solicitors for respondent: *Mackrell, Maton, Godlee & Quincey.*

[PRIVY COUNCIL.]

FALKNERS GOLD MINING COMPANY, LIMITED . . . . . APPELLANTS;

AND

McKINNERY . . . . . RESPONDENT.

J. C.* 1901 *July* 9, 27.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

Practice—Appealable Value—Issue as to Appealable Value to be decided by Court of Appeal—Admissibility of Affidavits.

Sect. 115 of the New South Wales Mining Act, 1874, gives a right of appeal to the Supreme Court in mining cases where the amount involved is not less than 500*l.*:—

Held, that the Supreme Court was wrong in refusing to hear an appeal on the ground that the value should be found and stated by the Court appealed from, and could not be ascertained by themselves on affidavit.

Scully v. *Murn*, (1893) 14 N. S. W. R. 289, overruled.

APPEAL from an order of the Supreme Court (Feb. 23, 1900) dismissing an appeal from a District Court under the New South Wales Mining Act, 1874, because it had not been proved at the hearing before the District Court Judge, and before his

* *Present:* LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C. 1901 FALKNERS GOLD MINING COMPANY v. MCKINNERY.

decision was given, that the property involved in the decision was of the value required for an appeal to the Supreme Court, namely (for this purpose), 500*l.*

The case came before the Supreme Court three times on this point, and on each occasion the appellants were made to pay costs. First (1), the Supreme Court sent back the case to the District Court Judge to be settled because (inter alia) the statement signed by them did not shew that the property involved was of the appealable value. Secondly (2), the Supreme Court refused a rule to direct the District Court Judge in settling the statement to receive evidence of the value. Thirdly, the Supreme Court finally refused to hear the appeal on the ground above stated. The Supreme Court has itself held (on giving leave to appeal to His Majesty in Council) that the property was of the appealable value.

Vaughan Hawkins, for the appellants, contended that it was not required by law as a condition of an appeal to the Supreme Court under s. 115 of the Mining Act, 1874, that it should have been proved in the lower Court before the decision appealed from that the amount involved in it was of the appealable value. A condition to that effect would be impossible to perform, for until the decision is made it does not appear what is the amount involved in it. The Supreme Court ought, in the circumstances, to have received evidence thereof. He referred to *Bourke* v. *Lucas* (3), which was an appeal under the said s. 115. In it an objection was taken that there was nothing in the proceedings before the District Court to shew that the property involved was of the appealable value. The objection was overruled. In *Scully* v. *Murn* (4) there was a conflict of affidavits as to value. The Supreme Court refused to decide it, and referred the question to the District Court. The latter Court also refused to decide it, and the Supreme Court erroneously, as was contended, dismissed the appeal. In this case affidavits of value to the extent of 2500*l.* were tendered by the appellants; but the

(1) (1899) 20 N. S. W. R. 262.
(2) (1899) 20 N. S. W. R. 428.
(3) (1882) 3 N. S. W. R. 217.
(4) 14 N. S. W. R. 289.

Supreme Court refused them, and held that, as the value was not proved at the hearing before the District Judge, an appeal would not lie as ruled in *Scully* v. *Murn*. (1) It was contended that the Court should have followed the ruling in *Bourke* v. *Lucas*. (2)

The respondents did not appear.

J. C.
1901
FALKNERS GOLD MINING COMPANY v. MCKINNERY.

The judgment of their Lordships was delivered by

1901
July 27.

SIR RICHARD COUCH. Under the Mining Act, 1874, of New South Wales (37 Vict. No. 13), all questions and disputes between miners in relation to mining on Crown lands are brought in the first instance before the Warden's Court, from which an appeal lies to the District Court sitting as a Court of Appeal in its mining jurisdiction. By s. 115 of that Act, it is enacted that, if either the appellant or respondent in any appeal to the District Court sitting as a Mining Appeal Court under the provisions of the Act shall be dissatisfied with the determination or direction of the District Court on any grounds, if the amount claimed or involved by the decision shall not be less than 500*l*., he may appeal from it to the Supreme Court of New South Wales, which may either order a new trial before the Mining Appeal Court on such terms as it thinks fit, or may order judgment to be entered for either party, and such order shall be final, and such appeal shall be in such manner and form and subject to such regulations in all respects as the judges of the Supreme Court shall by general rules in that behalf prescribe. By general rules of the Supreme Court dated November 18, 1875, the District Court Judge may sign a statement of the case with or without the assent of the parties, and on such statement with a copy of the notice of appeal and affidavit of service being filed in the Supreme Court Office, the appeal is to be entered for argument before the Supreme Court in the same way as other appeals under the District Courts Act of 1858.

On October 18, 1899, the judge of the Mining Appeal Court signed a statement of the case in a pending appeal before him,

(1) 14 N. S. W. R. 289. (2) 3 N. S. W. R. 217.

J. C.
1901
FALKNERS GOLD MINING COMPANY v. MCKINNERY.

in which the present appellants were the appellants and the present respondent was the respondent.

It is not necessary for the decision in this appeal to notice more of the statement in the case than that the Great Victory Gold Mining Company, Limited, whose right, title, and interest the appellants had purchased and had had conveyed to them by the liquidators of the company, were in March, 1895, the owners of two gold-mining leases numbered 293 and 372, that on May 25, 1895, Arthur James Chappell became the owner of a gold-mining lease numbered 594 adjoining the lease numbered 293, that in April, 1896, the Secretary for Mines authorized the amalgamation of the three leases, and in September, 1896, the respondent bought the right, title, and interest of Chappell. On November 25, 1898, the respondent took a proceeding in the Warden's Court against the appellants to have it declared that he was a shareholder in and entitled to a proportion of the gold won from the leases 293 and 372. On February 9, 1899, the Warden decided that the respondent was entitled to approximately one-fourth share in the amalgamated leases. Notice of appeal to the District Judge sitting as a Mining Appeal Court was given, and the appeal came on for hearing on March 11, 1899. Evidence was taken, but neither on that occasion nor in that taken before the Warden was there any evidence of the value of the one-fourth share.

Before noticing what was done subsequently, it will be convenient to refer to two previous decisions of the Supreme Court upon the question which arose on other occasions when a case stated under the general rules came before it. The first is *Bourke* v. *Lucas* (1), where, in an appeal under the part of s. 115 of the Mining Act, 1874, which related to appeals where the value of the property involved exceeded 50*l*., the objection was taken that the appeal could not be heard because there was nothing in the proceeding before the District Court to shew that the value of the property involved exceeded 50*l*., and the Court, without calling on the counsel for the appellant, held that the objection was not a good one. No reason for this decision is given in the report, and, therefore, their Lord-

(1) 3 N. S. W. R. 217.

ships abstain from expressing any opinion upon it. In *Scully v. Murn* (1), in an appeal from the Mining Appeal Court, the respondent's counsel took the preliminary objection that, as there was nothing before the Court to shew that the value of the property in dispute exceeded 50*l.*, the appeal could not be heard. The appellant's counsel thereupon said the appellant had filed an affidavit that the land was worth more than 50*l.*, and the respondent's counsel said the respondent had filed three affidavits in which the deponents swore the land was not worth 50*l.* Upon this the Chief Justice said: "Should not the value of the land appear in the special case?" And upon the appellant's counsel submitting that there was nothing in s. 115 that requires the value to be stated in the special case, and that the Court might decide it upon affidavit, the Chief Justice said: "How can we determine the value of this land on affidavits? In one affidavit it is said that the land is worth more than 50*l.*, and in the others it is said that the land is worth less than 50*l.*" Finally, the Chief Justice, with the concurrence of the two other judges, said: "We will refer this question of the value of the land to his Honour Judge Docker, if he sees fit to determine it. . . . If his Honour does not report that the value of the property in dispute exceeds 50*l.*, the case will be struck out with costs. This case must not be taken as a precedent; when an appeal comes on for hearing it must appear in the special case that the land in dispute is of sufficient value to give this Court jurisdiction under s. 115." Upon the case going back to Judge Docker, he refused to report as to the value of the land, as no evidence upon the point had been given at the hearing before him, and he was of opinion that he had no power under that statute to reopen the matter upon this point. The Supreme Court then, without any further argument, dismissed the appeal.

The proceedings of the Supreme Court in the present case are reported in 20 N. S. W. R. 262. For the respondent the preliminary objection was taken that, as there was nothing in the case to shew the amount in dispute between the parties, the appeal could not be heard. It was also noticed by the

(1) 14 N. S. W. R. 289.

J. C. 1901

FALKNERS GOLD MINING COMPANY v. MCKINNERY.

Court that the case did not shew what the point of law involved was. The Court ordered the case to be sent back to the judge and the appellant to pay the costs, the Chief Justice saying: "His Honour's attention should also be drawn to the case of *Scully* v. *Murn*. (1) It may be the judge will say that he cannot tell what the amount in dispute was. I notice in that case that Docker D.C.J. held that he could not reopen the case on this point, and I think he was right." When the parties went before the judge to settle the case, the appellants tendered evidence to shew that the value of the property in dispute was between 2000*l*. and 2500*l*. The judge, as might be expected after what the Chief Justice had said, refused to reopen the case and receive the evidence. Thereupon the appellants moved the Supreme Court for a rule nisi for a writ of mandamus to the judge, which was refused. This is reported in 20 N. S. W. R. 428, where the Chief Justice is reported to have said: "I decline to express any opinion on the cases of *Scully* v. *Murn* (1) and *Bourke* v. *Lucas* (2), though I may state that the matter was more fully considered in the former case. But I decline to say which decision is right. It will be open to the parties when the appeal comes before this Court to question one or other of those decisions." On February 23, 1900, the appeal came on for hearing before the Chief Justice and two other judges, when the appellants tendered, with other evidence, an affidavit of George Anderson, duly filed, proving the value of the property involved in the decision of the judge of the Mining Appeal Court to be over 2500*l*. The Court refused to hear the affidavit read, and dismissed the appeal with costs.

The reasons for this decision have been stated by the Chief Justice and concurred in by the two other judges. They appear to their Lordships to be that, so far as convenience and accuracy are concerned, the District Court is the proper Court to determine the matter, that in *Scully* v. *Murn* (1) the Court had laid down a general rule of practice so far as a decision of the Full Court could do so, and also the difficulty the Court in

(1) 14 N. S. W. R. 289. (2) 3 N. S. W. R. 217.

that case found itself in of having to decide a question of its own jurisdiction upon conflicting affidavits. Now, as regards the last reason, it cannot be disputed that there are many occasions when a Court has to decide a question of its own jurisdiction, and does it upon evidence which may be conflicting and difficult to decide upon; but their Lordships cannot assent to this being a valid reason for the Court not exercising its jurisdiction in declining to decide the question, and requiring the fact in dispute to be inquired into and stated by the Court from which the appeal is brought. As to convenience and accuracy, it may be doubted whether the rule laid down in *Scully* v. *Murn* (1) is more convenient than the Supreme Court making the inquiry when the value is disputed. This rule would make it necessary for the claimant in every case to be prepared with evidence of the value of his claim, and for the Warden or Mining Appeal Court to take the evidence of it and be careful to state the value. If they omit to do this, both parties will, according to *Scully* v. *Murn* (1), lose the right of appeal. Nor is it clear to their Lordships that this course is more likely to produce accuracy than an inquiry by the Supreme Court. As to the difficulty of deciding the question upon conflicting affidavits, there are many judicial proceedings in which questions have to be decided upon affidavits, but that is no reason for not deciding a question if the matter is within the jurisdiction of the Court. In this case the Supreme Court granted leave to appeal to Her late Majesty in Council upon affidavits, one being of George Anderson, who deposed as to the value of the property, the petition for leave stating that the judgment involved directly a claim, demand, and question of the value of 500*l.*, which was necessary. The Supreme Court does not appear to have had any difficulty then about the amount involved. Their Lordships are unable to approve of the decision in *Scully* v. *Murn* (1), and are of opinion that the order of February 23, 1900, dismissing the appeal, is erroneous. They will humbly advise His Majesty to reverse it with costs of the appeal to the Supreme Court, and, the

(1) 14 N. S. W. R. 289.

J. C. 1901 FALKNERS GOLD MINING COMPANY v. MCKINNERY.

value having been proved to be above 500*l.*, to remit the case to the Supreme Court to be heard according to s. 115 of the Mining Act, 1874.

The costs of this appeal will abide the result of that hearing, and be paid by the unsuccessful party.

Solicitors for appellants: *Blyth, Dutton, Hartley & Blyth.*

[PRIVY COUNCIL.]

J. C.* 1901 *May* 8; *June* 13

COOK . . . . . DEFENDANT;

AND

RICKETSON AND OTHERS . . . . . PLAINTIFFS.

ON APPEAL FROM THE SUPREME COURT OF NEW SOUTH WALES.

New South Wales Mining Act, 1874, *ss.* 13, 25—*Construction—Suspension of Pastoral Lease—Compensation.*

Held, that s. 13 of the New South Wales Mining Act of 1874 is plain and unambiguous. It confers on the Governor power to suspend a pastoral lease so far as may be necessary for certain defined purposes relating to the public safety and welfare. That power is not confined to land uncultivated or unimproved, or to water flowing in a natural watercourse. The effect of suspension is that while it lasts, and so far as it extends, all the rights of the lessee derived from the lessor are in abeyance, and the lessor is in the same position as if the lease had never been granted, and accordingly can resume possession. The compensation to which the lessee is entitled is limited to the return or remission of rent, no provision being made for cases where compensation so restricted is inadequate:

Held, further, that the construction of s. 13 cannot be controlled by s. 25, which relates to a different subject.

APPEAL from an order of the Supreme Court (Nov. 3, 1899) allowing a demurrer to the third plea of the appellant in an action of damages brought by the holders of a pastoral lease known as the Billabong Holding, No. 61.

The question involved was the meaning and effect of s. 13 of the Mining Act, 1874 (37 Vict. No. 13), which reserves to the

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

Crown the power of suspending a pastoral lease so far as necessary for the purpose of (inter alia) the supply of water for a proclaimed goldfield.

The material sections and the proceedings in the suit which raised this question will be found in the judgment of their Lordships.

The Chief Justice held that this case had been virtually decided in an earlier case (1) between the same parties, which raised the same questions and in which the Court had held that, although s. 13 of the Mining Act gave the Crown the power of suspending a pastoral lease so far as might be necessary for certain purposes which are in such sections defined, to wit, "for the accommodation of the horses, cattle, and sheep required for the subsistence and convenience of any persons holding miners' rights, licences, or leases, and for the supply of water, and otherwise for effectually working the said goldfield," it gave the Crown no further power; the rights conferred by that section being rights conferred upon miners who were given the particular rights for purposes necessary for the effectual working of the land as a goldfield, and that the Government had no power under that section to evict the pastoral tenant as they had admittedly done in this case.

He held, further, that, under s. 25 of the said Act, land such as the land in this case could be retaken by the Government only upon payment of compensation to be ascertained and fixed in the manner prescribed by the regulations made in that behalf. Or that if the Government preferred so to do, they might proceed, under the provisions of the 7th sub-clause of s. 78 of 48 Vict. No. 18 (Crown Lands Act of 1884), to withdraw such land from the lease upon payment of compensation for so withdrawing the land, and for improvements made upon it by the lessee. That by the adoption of either of these courses the tenants in this case would have obtained compensation for the improvements which, possibly at considerable cost, they had made, and that it was clear that the Government could not, by suspending that portion of the lease of the respondents which related to the land on which these particular

(1) (1899) 20 N. S. W. L. R. 298.

J. C. 1901 COOK v. RICKETSON.

improvements had been made, evade the liability of payment of compensation. He further expressed his opinion that the 13th section of the Mining Act was only intended to apply to water flowing in a natural course over or through leasehold lands, and that the 25th section of the said Act established the position that the 13th section was not intended to apply to water artificially reserved by a dam or in a tank excavated for such purpose.

Owen J. also held that the power given to the Government by s. 13 was only to suspend a lease so far as might be necessary "for the accommodation of the horses, cattle, and sheep required for the subsistence and convenience of any persons holding miners' rights for the supply of water, and otherwise for effectually working the said goldfield." That there was no other power given to the Government at all. That having once suspended the lease, there was an end of the matter so far as the Government was concerned. That if there was, as was alleged in the said plea, danger of the water on the land being polluted and of disease breaking out among the miners, then it was the duty of the Government to take further action in the matter and to withdraw the land from the lease altogether. That in this present case they did not take such course, but had entered upon the land merely on suspension of the lease, which he was of opinion they had no right to do. On the point as to whether under s. 13 the Government had power to suspend, as they had done, the said lease as to land which under s. 25 was exempt from occupation, he concurred with the learned Chief Justice.

Asquith, *K.C.*, and *Vaughan Hawkins*, for the appellant, contended that the demurrer should be overruled and the plea of suspension allowed. The suspension of the pastoral lease under s. 13 of the Mining Act of 1874 authorized and made lawful the acts of the Government, its officers and agents, and is a complete answer to the respondents' claim. It is not the law that the Crown after due suspension of a lease under s. 13 has no right or power of entering on the land comprised therein. On the contrary, so far as the lease is suspended, and while it

is suspended, all the rights of the lessee are in abeyance. The Crown is restored to the same position as against the lessee with regard to the land as if the lease had never been executed. Sect. 13 is not controlled in any way by s. 25, which relates to the exemption of land under certain circumstances from occupation by miners, and does not affect the power of suspension vested in the Government under s. 13. The only issue in this case is as to the true effect of suspension—whether it leaves any rights vested in the lessee which would entitle him to the relief claimed in this suit.

Cohen, K.C., and *Branson*, for the respondents, contended that the judgment of the Supreme Court was right, for the reasons stated in the judgment of the Chief Justice. They referred to s. 78, sub-clause 7, of 48 Vict. No. 18 (Crown Lands Act of 1884). They contended that s. 13 of the Mining Act of 1874 did not afford to the Government a valid defence against the respondents' claim, for it only gave the Crown a power of suspension in certain circumstances and for certain defined purposes. Its effect as regards the lessee is only to deprive him of the exclusive right of possession acquired by his lease. It did not give the Crown the right to go on the land or trespass on it in any way. Moreover, it did not apply to such cultivated or improved land as that in suit, or to the tanks or water in suit which had been artificially reserved by the respondents. By the course which the Government had taken they were evading the payment of compensation due to the respondents for the improvements which they had effected, and the Act in question ought not to be strained in their favour so as to effect that result.

Hawkins replied.

1901
June 13.

The judgment of their Lordships was delivered by

LORD MACNAGHTEN. The suit in which this appeal has been presented was brought by the respondent Henry Ricketson and his mortgagees as plaintiffs against the appellant as nominal defendant representing the Government.

In their declaration the plaintiffs alleged that they were the holders of a pastoral lease of certain Crown lands known as

J. C. 1901 COOK v. RICKETSON.

the Billabong Holding, No. 61, and that they had been wrongfully evicted by the Government, whereby they had been deprived of the benefit of their lease and of certain tanks and other improvements which they had made upon their holding, and that in consequence they had suffered loss, for which they claimed compensation in damages. In the first count they challenged the action of the Government as a breach of the covenant contained in their lease for quiet enjoyment, in the third count as a trespass, and in the fourth as a wrongful conversion of the water in their tanks. The second count was struck out.

To these three counts the defendant pleaded that the lands in question formed part of a goldfield duly proclaimed under the Mining Act, 1874, and that the Governor, under the power conferred upon him by s. 13 of that Act, had suspended the plaintiffs' lease of the Billabong holding as to two portions thereof, including two artificial tanks with the catchment areas round them, and that they had done so for the purpose of water supply, and that the acts complained of were lawfully done in and about the protection and preservation of the said water supply, and were not more than what was necessary for the purpose of preventing contamination or waste of the water, the outbreak of disease, and the occurrence of tumults and riots at the said tanks.

The plaintiffs demurred to this plea. After argument the demurrer was allowed. The Court, consisting of Darley C.J. and Owen J., held that the case was covered by the decision of the Supreme Court in *Ricketson* v. *Cook*. (1) Darley C.J. repeated what he had laid down in that case: "The Crown," he said, citing a passage from his former judgment, "in point of fact is not mentioned in s. 13. It has no rights under the section except that of suspension. The rights given by it were conferred on a certain class of the community, namely, miners. An officer of the Crown, no matter who he might be, would be a trespasser if he went on the land even after suspension. So would any other person, if he was not a miner. Only miners were given these particular rights for the subsistence of their

(1) 20 N. S. W. L. R. 298.

stocks and for the supply of water and other purposes necessary for the effectual working of the land as a goldfield. . . . The Government servants had no more power to go upon the land than ordinary individuals, nor has the Government power to evict the pastoral tenant." Then his Honour observed that the case raised another point, and, after quoting s. 25 of the Mining Act of 1874, he concluded his judgment as follows: "I am convinced that the 13th section of the Mining Act was only intended to apply to water naturally flowing over or through leasehold lands. The 25th section to my mind establishes that the 13th section was not intended to apply to water artificially reserved in a dam or tank excavated for the purpose." Owen J. was also inclined to think that the Crown had no power to suspend a lease of land exempt from occupation under s. 25; but he preferred to rest his judgment on the point that, after the suspension of the lease, the Crown had no right to go on the land or trespass on it in any shape or form. "Once having suspended the lease, there was an end of the matter so far as they were concerned."

Their Lordships are unable to accept the view of the Supreme Court as to the meaning and effect of ss. 13 and 25 of the Act of 1874.

The Act defines "Crown lands" as "all lands vested in Her Majesty which have not been dedicated to any public purpose, or which have not been granted in fee or lawfully contracted to be so granted, or which are not under lease for purposes other than pastoral purposes." In Part I. Division I. the Act deals with goldfields miners' rights and business licences. It authorizes the Governor by proclamation in the *Gazette* to declare any Crown lands to be a goldfield within the meaning and operation of the Act (s. 10), and to appoint wardens and other officers "for the efficient performance of the duties of inspection, surveying, and registration of claims and mines, and of all other duties in connection with mining and with the administration of" the "Act which the said Governor may think fit to impose" (s. 12).

Sect. 13 is in the following terms:—

"13. When any goldfield shall have been proclaimed upon

J. C. 1901 COOK v. RICKETSON.

any Crown lands then under lease or licence for pastoral purposes, the Governor may suspend such lease or licence so far as may be necessary for the accommodation of the horses, cattle, and sheep required for the subsistence and convenience of any persons holding miner's rights, licences, or leases, and for the supply of water, and otherwise for effectually working the said goldfield, and shall thereupon return or remit to the lessor or licensee such portion of the rent of such land as may be reasonable and just."

Sect. 14 empowers the Governor to issue documents called "miners' rights." Sect. 15 defines the rights and privileges conferred by such documents. Every holder of a miner's right is entitled to enter upon, mine in for gold, and occupy for gold mining purposes or for residence during the continuance of such miner's right, any Crown lands in accordance with the prescribed regulations. Sect. 21 provides for the issue of documents called "Business licences," entitling the holder to occupy land in a goldfield for the purpose of residence and for business purposes.

Sect. 25 is in the following terms:—

"25. All Crown lands which shall have been applied or shall be dedicated to any public use or purpose, or which shall be lawfully and bonâ fide used as a yard, garden, cultivated field, or orchard, or upon which any house, outhouse, shed, or other building actually used and occupied, or any artificial dam or reservoir shall be lawfully standing, shall be and the same are hereby exempted from occupation for the purpose of mining for gold or for any other mineral or metal, and for residence or business, under any miner's right or business licence under this Act. Provided that any Crown lands which shall have been so lawfully and bonâ fide used as aforesaid, or upon which any house, outhouse, shed, or building, or any artificial dam or reservoir shall be standing, shall, upon payment of compensation to be ascertained and paid in the manner prescribed by the regulations, cease to be exempted from such occupation."

Now, it appears to their Lordships that s. 25 really throws no light on the meaning and effect of s. 13. The two sections deal with very different subjects. Sect. 25 exempts Crown

lands devoted to certain special purposes from occupation or interference by persons holding "miners' rights" or "business licences" until compensation be ascertained and paid in the prescribed manner. Sect. 13 confers upon the Governor power to suspend a pastoral lease so far as may be necessary for certain defined purposes which concern the safety and welfare of the public, or rather that portion of the public which flocks to proclaimed goldfields.

The power of suspension is not confined to land uncultivated or unimproved, or to water flowing in a natural watercourse. There is no restriction of that sort to be found in the Act. Of the necessity for intervention in any particular case, the Governor, acting on the advice of his responsible Ministers, is and must be the sole judge. The section seems to contemplate that a lessee whose lease is suspended will receive such compensation "as may be reasonable and just" by the return or remission of rent. But the enactment is certainly open to the criticism of the Chief Justice. It does not provide for a case where the injury to the lessee is out of all proportion to the amount of his annual rent. It is, therefore, obvious that in some cases, and possibly in the present case, the measure of compensation provided by the section must fall far short of what is "reasonable and just." A later Act gives the Governor power to "withdraw" lands from a pastoral lease for mining purposes. In the case of "withdrawal" provision is made for full compensation. But s. 13 of the Act of 1874 is left unrepealed and unaltered. And the Governor, therefore, is bound to act upon that section if, in his judgment, it is necessary to do so.

The words of s. 13 are plain and unambiguous, and their Lordships are of opinion that they must receive their ordinary meaning, and have full effect given to them, even though the result may be that now and then a grievous hardship may be inflicted on an individual for whom no adequate compensation is provided by the Act. In such a case it is not to be presumed that the lease would be suspended except in a serious emergency, and it can hardly be supposed that the individual would be left without compensation, though he has no remedy at law.

J. C. 1901 COOK v. RICKETSON.

If the words of the section are to receive their ordinary and natural signification, the only remaining question is what is the effect of "suspending" a lease. It seems to their Lordships that during the period of suspension, and so far as regards the portions of the land leased to which the suspension extends, all the rights of the lessee derived from the lease are in abeyance. The lessee has no longer any right to the occupation of the land. On the other hand, the rights of the lessor are no longer bound and fettered by the lease. As nothing now stands between the lessor and the possession of the land, of which subject to the lease he is the absolute owner, he is entitled to enter and resume possession. He is in the same position for the time as he would have been if the lease had never been in existence. Though the power of suspension is conferred on the Governor in order to meet the necessities of a mining population, nothing is given by the section directly to persons holding "miners' rights" or "business licences." The rights, whatever they may be, that such persons have under the Act are left untouched. In the present case, having regard to s. 25, it would seem that the lands as to which the lease was suspended were exempt from occupation or interference by persons holding "miners' rights" or "business licences," and so by reason of the suspension the Government for the time became entitled to the exclusive right of occupation.

In the result, therefore, their Lordships are of opinion that, in their desire to prevent injustice to individuals, the Supreme Court has placed too narrow a construction on s. 13 of the Mining Act of 1874. They are of opinion that the demurrer ought to have been overruled, and they think that any costs paid under the order of the Supreme Court ought to be returned, and they will humbly advise His Majesty accordingly.

The respondents must pay the costs of the appeal.

Solicitors for appellant: *Light & Galbraith.*
Solicitors for respondents: *Keen, Rogers & Co.*

[PRIVY COUNCIL.]

OWNERS OF THE SS. CHITTAGONG . DEFENDANTS; J. C.*
1901
AND
OWNERS OF THE SS. KOSTROMA . . PLAINTIFFS. July 2, 27.

ON APPEAL FROM HIS BRITANNIC MAJESTY'S COURT AT CONSTANTINOPLE.

Collision—Negligence.

Held, that the appellant vessel, which was admittedly at fault in taking too sharp a turn across the course of the respondent, was guilty of negligence in not reversing her engines when the respondent gave notice that she would continue her course without alteration.

APPEAL from an order of the above Court (Aug. 1, 1900) in a collision action, whereby the collision in question was pronounced to have been caused solely by the negligent navigation of the SS. *Chittagong*. The question raised by the appellant was whether the *Kostroma* ought not to be held solely, or at least in part, to blame.

The Court found that the charge against the *Kostroma* of entering the Bosphorus on the wrong side of the channel failed for want of proof; that no blame attached to those on the *Kostroma* for not seeing the green light of the *Chittagong* sooner than they did because, although the lights of the *Chittagong* were properly exhibited, the most probable conclusion suggested by the evidence was that, owing to the direction in which the *Chittagong's* head was pointing during the greater part of her manœuvre, her green light was not visible to the *Kostroma* before the latter altered her course to starboard; and that the *Kostroma* was not to blame for so altering her course to starboard. The learned judge considered that the regulations relating to steamships crossing applied, and found that

* *Present:* LORD HOBHOUSE, LORD DAVEY, LORD JAMES OF HEREFORD, LORD ROBERTSON, and SIR RICHARD COUCH.

J. C. 1901 OWNERS OF SS. CHITTAGONG v. OWNERS OF SS. KOSTROMA.

the *Kostroma* made no default in the duty which lay upon her to keep her course and speed.

With regard to the *Chittagong*, the learned judge found that at the time when the *Kostroma* changed her course the *Chittagong* was really on her wrong side of the channel, but that no blame was attributable to her in this respect, as it was not practicable for her in the circumstances to keep nearer to her starboard side of the channel than she did. He was of opinion, however, that the *Chittagong* must be held to blame for not keeping out of the way of the *Kostroma* under art. 19 of the regulations, and under art. 23, for not stopping and reversing her engines at once, or as soon as she might have done after the *Kostroma* opened her red light.

Aspinall, K.C., and *T. F. D. Miller*, for the appellants, contended that the evidence shewed that the *Kostroma* was proceeding on the wrong side of the navigable channel in breach of art. 25 of the Regulations for Preventing Collisions at Sea. It was owing to a defective look-out on board the *Kostroma* that her course was improperly altered. Having altered her course, she improperly failed to keep it and improperly put her helm hard-a-port, and when a collision became imminent failed to stop or reverse her engines, or to do her best to avert a collision. It was shewn that the *Chittagong* stopped and reversed her engines as soon as the danger of collision appeared. Under the circumstances, art. 19 of the regulations did not apply or come into operation so as to cast a duty on the *Chittagong* to keep out of the way of the *Kostroma*; and all reasonable and proper measures were taken by those on board the *Chittagong* to avoid a collision.

Joseph Walton, K.C., and *Dr. Stubbs*, for the respondents, were not heard.

1901 *July* 27.

The judgment of their Lordships was delivered by

LORD JAMES OF HEREFORD. This is an appeal from a judgment or order of the Consular Court of Constantinople dated August 1, 1901, whereby the appellants—the defendants in the suit—were declared to be liable in consequence of a

collision between the above-named two vessels having been caused by the negligent navigation of the appellants' vessel, the *Chittagong*.

The collision in question occurred under the following circumstances:—

On March 4, 1900, the *Chittagong* was anchored in the Bosphorus on the western or European side, below the palace of Dolma Bagtche. She was lying at the usual anchorage ground heading up the Bosphorus. In order to continue her voyage to Singapore, about 10.30 in the evening of March 4, she weighed her anchor, and after steaming slowly ahead for a short distance she proceeded to turn short round.

At this time the *Kostroma* was coming up the Bosphorus from the Sea of Marmora, and the *Chittagong* would whilst turning be running across her course. It seems to be admitted that the *Chittagong* was by her movement on a wrong course or in a wrong position, whilst the *Kostroma* was on a right course. But on the part of the *Chittagong* it was urged at the bar that although by putting her helm a-starboard she was on a wrong course, the *Kostroma* by observing the lights or by giving heed to "the two blasts" from the *Chittagong* could have ascertained without doubt the course the *Chittagong* was taking, and could have avoided the collision by altering or deviating from the right course on which she was. It was, however, answered that the lights of the *Kostroma* were open to the observation of those on board the *Chittagong*, and the one short blast given twice from the former vessel was a distinct notice that she was continuing on her course.

The judge in the Court below came to the conclusion that under the circumstances the *Chittagong* should have ported her helm, and that if this had been done the collision might not have occurred.

Their Lordships also are of opinion that the collision was solely occasioned by the negligence of those on board the *Chittagong*. Whilst it is not a decisive fact, yet it is most important in its effect that the *Chittagong* was pursuing a wrong course at the time of the collision, and that such wrong course ought not to have been persisted in after it was known

J. C.
1901
OWNERS OF SS. CHITTAGONG v. OWNERS OF SS. KOSTROMA.

that the *Kostroma* had not altered hers. This latter vessel, being on her right course, was justified in assuming that the *Chittagong* would give way and not persist after being warned in following a wrong course.

Their Lordships are informed by the nautical assessors who have been present during the hearing of the case that the initial fault of the *Chittagong* was in having tried to make too sharp a turn, and they also expressed a strong opinion that there was negligence on the part of those who had charge of the *Chittagong* in not reversing her engines and going astern when they found that the *Kostroma* was pursuing her course.

Their Lordships will, therefore, humbly advise His Majesty that the judgment of the Court below should be confirmed, and that the appeal should be dismissed. The appellants must pay the costs of the appeal.

Solicitors for appellants: *Botterell & Roche.*
Solicitors for respondents: *Jull, Godfrey & Danvers.*

[PRIVY COUNCIL.]

HARVEY . . . . . DEFENDANT;

AND

THE KING . . . . . PLAINTIFF.

J. C.*
1901
May 7;
June 13.

ON APPEAL FROM THE SUPREME COURT OF CEYLON.

Ceylon Procedure Code, c. 12, s. 87—*Decree Absolute for Default—Reasonable Excuse for Default—Order of Master in Lunacy—Lunacy Act*, 1890, s. 116 (*Imperial*)—*Admissibility.*

Under the Ceylon Civil Procedure Code, c. 12, s. 87, a decree absolute for default may be set aside if the defendant upon notice to the plaintiff satisfies the Court by good and sufficient evidence that his default was due to accident, or misfortune, or want of due information of the proceedings.

An order of a Master in Lunacy in England under s. 116 of the Lunacy Act, 1890, reciting that the defendant was in the opinion of the master a person of unsound mind, though not so found by inquisition, and authorizing his wife to defend the action, is admissible as primâ facie evidence, and if uncontradicted ought to be regarded as sufficient evidence to justify an order under s. 87.

APPEAL by special leave from decrees of the Supreme Court (July 6, 1897, and Jan. 13, 1898) reversing an order of the District Court of Badulla (April 7, 1897), and refusing to set aside ex parte proceedings and to allow the defendant's committee to defend the action.

On November 23, 1896, a decree was made absolute by the District Court, under the circumstances stated in their Lordships' judgment, against the appellant for Rs.27,823 and costs.

On April 7, 1897, the District Court ordered that, on the appellant giving security to satisfy the respondent's claim and costs, the said decree should be discharged and the action proceed in due course.

The Supreme Court reversed this order on the ground that no good and sufficient evidence had been given by the appellant

* *Present:* LORD MACNAGHTEN, LORD LINDLEY, SIR RICHARD COUCH, and SIR FORD NORTH.

J. C. 1901 HARVEY v. REX.

to justify the Court in making an order under s. 87 of the Civil Procedure Code (No. 2 of 1889). Their judgment left untouched the questions of fact and law, whether the appellant was from the beginning of the proceedings of unsound mind, incapable of understanding that an action was instituted, and whether an action so begun was ab initio void. These questions (as the learned Chief Justice observed) were not before the Court, the issues of fact not having been tried.

Bray, K.C., Dornhorst, Meryon White, and *Corbet,* for the appellant, contended that this order of reversal, and a later one which affirmed it in review, should be reversed, and that the order of the District Judge should be restored, save so far as it required security to be given. Assuming the respondent's proceedings to have been in every respect valid and regular, the District Judge had jurisdiction to set aside the decrees which he had obtained under ss. 86 and 87 of the Civil Procedure Code. The appellant had satisfied the Court that there were reasonable grounds for his default, and that he had been prevented from appearing for the reasons contemplated by s. 87. But in truth the respondent's proceedings had been from first to last irregular for this reason, that the appellant had been throughout a person of unsound mind. At all events, from July 15, 1896, the date of the Master in Lunacy in England making an order adjudicating the appellant to be a person of unsound mind and appointing his wife committee of his estate, they were invalid and irregular. A case for setting them aside was amply made out under s. 87. See also ss. 479, 480, 501.

Haldane, K.C., and *G. Lawrence,* for the respondent, contended that no good and sufficient evidence had been given by the appellant that his default had been occasioned by accident or misfortune, or by his not having received due information of the decree nisi and other proceedings in the cause. With regard to his being of unsound mind from the commencement of the proceedings, or even from July 15, 1896, there was no sufficient evidence before the Court to establish that allegation. The orders by the Master in Lunacy were not admissible in

evidence. No attention should have been paid to them, and the respondent was not called upon to contradict them.

Bray, K.C., replied.

June 13. The judgment of their Lordships was delivered by

LORD LINDLEY. This is an appeal from an order of the Supreme Court of Ceylon refusing to set aside a judgment obtained against the appellant in default of appearance under the following circumstances.

The appellant was an engineer employed by the Government in Ceylon. In 1891 he met with a serious accident, which so affected his health and mental faculties that in 1894 he was compelled to give up work. He retired on a pension and came to England. In January, 1895, he attempted to return to Ceylon, and he proceeded on his way there as far as Naples, when he was compelled by the state of his health to return to England. He has ever since resided in this country except for a short time, when he went to Belgium. Ever since the beginning of 1895 Mr. Harvey has been quite unable to attend to any business or to manage his own affairs.

On January 9, 1895, the Government of Ceylon, through the Attorney-General, instituted an action in the District Court of Badulla for the recovery of Rs.27,823.44 alleged to have been received by Mr. Harvey for the use of the Crown in his capacity of provincial engineer, and to have been by him wrongfully appropriated and converted to his own use, and the Government sequestrated his property.

On or about the same date the said Government also commenced criminal proceedings in the police court of Badulla before Mr. J. G. Fraser, who was also the judge of the District Court, charging Mr. Harvey criminally in respect of the same matters as those referred to in the action.

On March 2, 1895, upon an extradition warrant issued at the instance of the Government of Ceylon in connection with the said criminal proceedings in the police court of Badulla, Mr. Harvey (who was at that time in England and confined to his bed by illness) was arrested and incarcerated in Holloway Gaol.

On March 15, 1895, upon an affidavit by William Aldren

J. C. 1901 HARVEY v. REX.

Turner, M.D., as to Mr. Harvey's mental and bodily condition, Wright J., after hearing counsel for the prosecution, ordered Mr. Harvey to be released on bail till March 24, 1895.

On March 22, 1895, upon an affidavit by Bernard Frederick Hartzhorne, M.R.C.S., England, as to Mr. Harvey's mental condition, Wright J., after hearing counsel for the prosecution, allowed the bail to be enlarged till March 30, 1895, and ordered Mr. Harvey to be examined by Dr. Gage Brown (now Sir Charles Gage Brown, K.C.M.G.), at that time holding the post of medical adviser or physician to the Colonial Office. That gentleman made a report which stated that Mr. Harvey was quite unfit to be sent to Ceylon, and could not here be dealt with in a Court of Law with justice, and that he would probably become less and less fit to be brought to trial. On this report Wright J., on March 29, enlarged Mr. Harvey's bail till June 29, 1895.

At the suggestion of Wright J. the said Drs. Gage Brown and Bernard Frederick Hartzhorne, under the directions of the Solicitor to the Treasury, jointly examined Mr. Harvey; and they reported to the said solicitor as follows on May 24, 1895: "His brain condition has deteriorated since he was reported on the 25th day of March last, as the report indicated it would be likely to do . . . . His memory cannot be relied on for anything . . . . Our conclusion is that he is of unsound mind through brain disease, and cannot justly be put upon trial. He cannot plead, he cannot understand evidence, he cannot give evidence."

On May 30, 1895, upon reading the aforesaid report, and after hearing counsel for the prosecution, Wright J. ordered the bail to be enlarged till December 29, 1895.

Between June and December, 1895, Mr. Harvey was examined more than once by the said Dr. Gage Brown and by Dr. Mawdsley (1), a specialist in brain diseases appointed by the Secretary of State for the Colonies on behalf of the said Government, and the said doctors jointly made a confidential report to the said Secretary of State, as a result of which the Solicitor to the Treasury on behalf of the Government unhesi-

(1) [*Sic* in the record.]

tatingly consented to the recognizances of Mr. Harvey and his sureties being finally discharged.

On December 20, 1895, Wright J. accordingly ordered the said recognizances to be discharged, and he furthermore directed that the attendance of Mr. Harvey at Bow Street should be dispensed with. The criminal proceedings instituted in the police court of Badulla against Mr. Harvey by the Government of Ceylon thereupon came to an end.

In January, 1896, the summons in the civil action was served on Mr. Harvey in Brussels. On March 7, 1896, Mr. Taylor, who had been appointed by Mr. Harvey in 1894 to act for him in his absence, informed the Court by affidavit of Mr. Harvey's condition and of the proceedings in England before Wright J. The action came on on March 23, 1896, but it was postponed for three months to enable Mr. Taylor to communicate with the defendant's solicitors in London.

On June 23, 1896, the action was called on. A motion that the action should abate was made by a Mr. De Silva, acting under instructions from England, and came on at the same time. Affidavits by him and by a solicitor in England and a number of exhibits from England, including office copies of the orders made by Wright J. and of the evidence before him, were laid before the Court, and the action and the motion were postponed for a fortnight.

On July 7, 1896, the motion was dismissed with costs, and an order was made that the case should be set down for ex parte hearing on October 15, 1896.

On July 15, 1896, a Master in Lunacy in this country made an order, under s. 116 of the Lunacy Act, 1890, appointing Mrs. Harvey to receive the income of Mr. Harvey's property, and to apply such income for the maintenance of Mr. and Mrs. Harvey and their infant child. This order is headed "In the matter of Henry Beecroft Harvey, a person of unsound mind not so found by inquisition," and it contains a recital in the following terms: "it having been established to my satisfaction that the said Henry Beecroft Harvey is of unsound mind and is incapable of managing his affairs."

On October 15, 1896, before the ex parte trial of this action,

J. C. 1901 HARVEY v. REX.

the said Attorney-General and Mr. Crown Counsel Cooke appearing for the Crown, the said J. W. de Silva produced to the said District Court an office copy of this order of the Master in Lunacy.

The said office copy was verified by the stamp of the Masters in Lunacy, and by affidavit. A further affidavit was produced stating in effect that Mr. Harvey's solicitors were advised by counsel to obtain a power of attorney from Mrs. Harvey, and also an order empowering her to defend this action and grant such power.

The District Judge nevertheless refused to stay the proceedings, and ordered the ex parte trial of this action to proceed; and on October 29, 1896, a decree nisi was passed in favour of the Crown for the sum of Rs.27,823.44, with the costs of the action, the defendant having failed to answer or to appear.

This decree was made absolute on November 23, 1896.

Although their Lordships have thought it desirable to allude to these proceedings at some length, they have done so only in order to shew the information which the officers of the Crown and the District Court had when the decrees nisi and absolute were made.

Their Lordships do not think it necessary to examine the provisions of the Ceylon Code in order to ascertain whether the proceedings above referred to were in any respect irregular. The fact that the defendant had not answered or appeared cannot be disputed; but if the order nisi had not been served on the defendant there was a serious defect in the proceedings, as pointed out by Browne J. However, assuming the decrees nisi and absolute to have been in all respects perfectly regular, it by no means follows that they ought not to be set aside. The Ceylon Civil Procedure Code, 1889, c. 12, s. 87, contains the following important provision to prevent any injustice being done to defendants who, through no fault of their own, have decrees made against them in their absence.

"No appeal shall lie against any decree nisi or absolute for default; but if any defendant against whom a decree absolute for default shall have been passed shall within a reasonable time after such decree appear and satisfy the Court, upon

notice to the plaintiff, by good and sufficient evidence that he was prevented from appearing to shew cause against the notice for making the decree absolute by reason of accident or misfortune, or by not having received due information of the proceedings, and shall, if the Court shall in its discretion so require, give good and sufficient security to satisfy the plaintiff's claim and costs of action, the Court may, upon such terms and conditions as such Court shall think it just and right to impose, set aside the decree, and direct that the action be proceeded with as from the stage at which the decree was for default of the defendant made.

"The order setting aside or refusing to set aside the decree shall be accompanied by a judgment adjudicating upon the facts and specifying the grounds upon which it is made, and shall be liable to an appeal to the Supreme Court.

"The mere consent of the plaintiff's proctor will not be reason sufficient to justify the Court in setting aside the decree."

In December, 1896, Mr. Taylor made an unsuccessful attempt to induce the Supreme Court to send for the record and to revise and set aside the proceedings on the ground of their irregularity; but this attempt failed. It was held to be unnecessary, the proper mode of proceeding being that prescribed by the above article of the Code.

On January 18, 1897, the Master in Lunacy in England made an order headed in the same way as the previous order, and authorizing Mrs. Harvey to take such proceedings in her husband's name as might be necessary for the purpose of defending the action against him in Ceylon, and of appealing from any judgment of the Court there, and also authorizing her to execute in her husband's name such power of attorney as might be necessary for such purpose. This order contains a recital as follows: "it having been established to my satisfaction that the said Henry Beecroft Harvey continues to be of unsound mind and incapable of managing his own affairs."

Armed with this authority, Mrs. Harvey appointed Mr. Taylor to act for her husband, and to take such steps as might be necessary to have the decrees against him set aside, and to

J. C. 1901 HARVEY v. REX.

enable him to defend the action. Accordingly, a petition for this purpose was presented in the District Court on February 27, 1897. It was supported by an affidavit of Mr. Taylor, making an exhibit of the power of attorney which recited the orders in Lunacy, but it does not appear that those orders or copies of them, or the various orders and exhibits previously brought to the attention of the District Court, were made exhibits to this affidavit, nor did the petition or affidavit state that Mr. Harvey continued to be and was at the time of unsound mind and incapable of managing his affairs. The order in Lunacy of January 18, 1897, was, however, put in evidence before the District Judge and was admitted by him, and he set aside the decrees nisi and absolute. His order, dated April 7, 1897, was as follows: "It is ordered that on the defendant giving good and sufficient security on or before the 26th day of April, 1897, to satisfy the plaintiff's claim and costs of action up to the 7th day of April, 1897, that the decree nisi entered in this case on the 29th day of October, 1896, and made absolute on the 23rd day of November, 1896, be discharged, and that the action do proceed in due course, and that the 26th day of April, 1897, be fixed for the defendant to answer the plaintiff's claim."

The District Judge who made this order was Mr. Fraser, who on previous occasions had been informed of all that had taken place in England, as hereinbefore stated.

The Attorney-General, on behalf of the Government, appealed to the Supreme Court of the Island of Ceylon against this order in its entirety, and Mrs. Harvey subsequently lodged an appeal against so much of the said order as required her to give security.

On July 6, 1897, the Supreme Court (Lawrie J., Acting Chief Justice, and Withers J., Puisne Justice) set aside the said order of April 7, 1897, and dismissed the said Eleanor Frances Julian Harvey's petition of February 27, 1897, with costs. Their Lordships' judgment is to the effect that the said petition and motion of February 27, 1897, if successful, could only be successful to the extent of causing the decree absolute of November 23, 1896, to be set aside, but could not affect the

decree nisi of October 29, 1896; that the said Henry Beecroft Harvey had had due notice of the proceedings; and that he was not prevented by accident or misfortune from appearing on November 23, 1896, to shew cause against the decree nisi.

On November 26, 1897, the foregoing judgment having been brought up in review before the Collective Supreme Court (Lawrie J., Acting Chief Justice; Withers J., Puisne Justice; Browne J., Acting Puisne Justice), preparatory to an appeal to Her Majesty in Council, the said judgment was, on January 13, 1898, confirmed, with costs.

Their Lordships are quite unable to concur in these orders reversing the order of Mr. Fraser. The learned judges of the Supreme Court regarded Mr. Taylor as properly representing and acting for Mr. Harvey throughout these proceedings, and they seem to have regarded his conduct as embarrassing. Taking this view, they came to the conclusion that Mr. Harvey failed to bring his case within the 87th article of the Code. Having carefully attended to the evidence before them, their Lordships have come to the conclusion that the learned judges in Ceylon have misjudged Mr. Taylor and the steps he took. Mr. Taylor, although he was appointed in 1894 to act for Mr. Harvey, could not act for him after he became of unsound mind to Mr. Taylor's knowledge. Mr. Taylor from the first felt the difficulty he was in. Except when he applied to the Court in December, 1896, as already mentioned, he never assumed to act for Mr. Harvey as his attorney, or as in any way legally authorized to represent him, until authority so to do was conferred upon him by the order in Lunacy of January 18, 1897. With the same exception, all that Mr. Taylor did before that time was to inform the Court of the condition of Mr. Harvey and of the impossibility of his defending the action. In a statement made to the District Court on March 7, 1896, Mr. Taylor referred to his power of attorney of 1894, and distinctly stated that he was advised by counsel that he could not safely act upon it; and in another statement made on March 23, 1896, he explained his position more in detail so as to remove all misconception on the matter. Mr. Taylor made a mistake in December, 1896, but otherwise his

J. C. 1901 HARVEY v. REX.

conduct appears to their Lordships to have been correct throughout; and not only correct, but proper and respectful to the Court. His conduct certainly ought not to have prejudiced Mrs. Harvey's subsequent application under art. 87 in the slightest degree.

The judges of the Supreme Court rely on the abortive attempt made in December, 1896, to have the proceedings set aside as conclusive to shew that the committee and the attorney were not prevented from appearing on November 23, 1896, and shewing cause against the decree nisi being made absolute.

Mr. Taylor's petition of December 1, 1896, appears to have been irregular, and it seems to their Lordships to have been properly dismissed. But the conclusion drawn by the Supreme Court from his action on that occasion is in their Lordships' opinion quite erroneous. On November 23, 1896, Mr. Taylor informed the Court of the real state of the case: he could do no more. Mrs. Harvey, who is referred to as the committee, was not her husband's committee; she had no general authority to act for him; she only had the limited authority conferred upon her by the Master in Lunacy to receive the income of her husband's property, and to apply it in maintaining him and herself and their child.

Passing from this, the learned judges of the Supreme Court considered that the question of the defendant's sanity was not before them—that the issue of fact had not been tried. Here again their Lordships are unable to concur with them. It is, no doubt, true that the defendant had not been formally found lunatic on an inquisition; but s. 87 of the Code does not require that he should. The evidence strictly before the District Court on the application to set aside the decrees and before the Court of Appeal was uncontradicted, and in fact unchallenged. Such evidence was not so complete as it might have been, for it did not include all that was known to Mr. Fraser, and all that is in evidence before their Lordships. But although this is so, the evidence adduced was in their Lordships' opinion sufficient for the purpose for which it was wanted and for which it was used. It was, in the language of the Code, "good and sufficient evidence that he" (i.e., the defendant) "was

prevented from appearing to shew cause against the notice for making the decree absolute by reason of accident or misfortune, or by not having received due information of the proceedings."

One of the learned judges, Browne J., intimated that the evidence filed in support of the application under s. 87 of the Code consisted only of the affidavit of a Ceylon solicitor and the exhibit thereto. The learned judge appears to have overlooked the fact that the second order in Lunacy was put in evidence before the District Judge, as their Lordships have already pointed out. If the application had been adjourned for further evidence, ample evidence was in Ceylon, and could have been produced, as the officers of the Crown well knew.

Mr. Haldane was bold enough to contend that the orders in Lunacy were not admissible in evidence in these proceedings at all, and that the Courts in Ceylon were justified in paying no attention to them. Their Lordships are not prepared to accede to this contention. The orders are not conclusive evidence of anything except their own existence; but, being made by a competent tribunal in a matter within its jurisdiction, they cannot be rejected as inadmissible, or as no evidence of the truth of those facts recited in them which are essential to their validity. They are admissible as primâ facie evidence, and if uncontradicted they ought to be regarded as sufficient evidence of those facts, not only in this country, but in all His Majesty's dominions.

Their Lordships have come to the conclusion that the orders appealed from, namely, those of July 6, 1897, and January 13, 1898, cannot stand, and they will humbly advise His Majesty that these orders should be reversed with costs, and that the order of the District Judge of April 7, 1897, setting aside the decrees nisi and absolute, should be restored so far as it sets them aside, but not so far as it requires security, which is no longer necessary by reason of the sequestration of the defendant's property. They will further humbly advise His Majesty that the order of July 7, 1896, so far as it directed the case to be set down for hearing ex parte, shall be discharged if the District Court in Ceylon shall be of opinion that effect cannot properly be given to this order whilst such order stands, and

J. C. 1901 HARVEY v. REX.

that the action should be remitted to the District Court in Ceylon to be proceeded with and to be tried on its merits. The respondent must pay the costs of this appeal.

Solicitor for appellant: *J. G. Dalzell.*
Solicitors for respondent: *Sutton, Ommanney & Rendall.*

[PRIVY COUNCIL.]

J. C.* 1901 July 13.

QUINLAN. . . . . APPELLANT;

AND

QUINLAN. . . . . RESPONDENT.

ON APPEAL FROM THE ROYAL COURT OF ST. LUCIA.

Practice—Leave to Appeal in Formâ Pauperis—Order granting Leave discharged.

Leave to appeal to the King in Council in formâ pauperis is not of course, and ought not to be granted where it is made apparent that the proposed appeal is idle and frivolous. An order to that effect discharged when on the application of the respondent it appeared that there was no substantial question to be tried, and where the order would not have been made if all the materials had been before their Lordships.

THIS was a petition by the respondent to rescind an Order in Council dated June 29, 1900, and granting to the appellant special leave to appeal in formâ pauperis to Her Majesty in Council against certain decrees and orders of the Royal Court of St. Lucia, dated July 20, 1899, December 21, 1899, and February 7, 1890. (1) It alleged that the grounds stated in the petition of the appellant on which the Order in Council had been made consisted partly of a recital of the proceedings in the two suits brought in the Royal Court so inaccurate and imperfect as to be misleading, and partly of a series of unfounded charges against the Chief Justice.

Mayne, for the petitioner, submitted that his affidavits completely exonerated the Chief Justice from the imputations cast upon him, and that if a faithful account of the proceedings in

* *Present:* LORD HOBHOUSE, LORD DAVEY, LORD ROBERTSON, and SIR RICHARD COUCH.

(1) See [1900] A. C. 496.

the said two suits had been laid before their Lordships, the order complained of would not have been made and should now be rescinded.

Bernard Campion, for the appellant, contended that the order had been rightly made.

The reasons for the report were delivered by

LORD DAVEY. This is a petition to discharge an Order in Council of June 29, 1900, whereby leave was given to the respondent on this application to appeal in formâ pauperis against certain orders or decrees of the Royal Court of St. Lucia. Those orders or decrees were—(1.) a final decree for separation of the respondent and his wife; (2.) a final decree in a mortgage suit instituted by his wife against the respondent; and (3.) an order for execution of the mortgage decree.

On the original application the present respondent made the usual affidavit of poverty. The peculiarity of the case is that it appears from the Civil Procedure Code of St. Lucia (arts. 934, 940) that a litigant wishing to appeal from the Royal Court to the Court of Appeal of the Windward Islands must name his sureties, or deposit his security, with his notice of appeal. This seems inconsistent with any power to appeal in formâ pauperis, and it does not appear that any such power is recognised. It was, therefore, necessary for the respondent, being a pauper, if he wished to appeal, to apply for special leave to appeal here. Moreover, it seems doubtful whether, if he had appealed to the Court of Appeal of the Windward Islands in the separation suit, he could afterwards have appealed as of right to the King in Council, as no pecuniary interest was primâ facie involved in that suit, but in the mortgage suit he could have appealed as of right from an adverse judgment of the Court of Appeal.

In these circumstances their Lordships advised Her late Majesty to make the order which it is now sought to discharge. But in doing so they warned the then petitioner and present respondent that he must be prepared to meet an application to discharge the order.

The present application is based on the grounds that the

J. C. 1901 QUINLAN v. QUINLAN.

former petition contained misleading statements, and that material facts were withheld. It is fair to the respondent to say that his petition does not appear to have contained any actual misrepresentation of any material facts, though many of the allegations in it were irrelevant. But it is said that it did not fully state the effect of the evidence in the two suits, and that if their Lordships' attention had been called to the proceedings at the trial it would have at once appeared that there was no foundation for the proposed appeals, and that in fact the appeals in both suits were frivolous.

With regard to the separation suit the question was one purely of fact, and it was very properly admitted by counsel for the respondent that on the evidence before the Court he could not hope to induce their Lordships to reverse the decision of the Chief Justice.

In the mortgage suit the respondent by his defence admitted the deeds sued on, but pleaded that by a counter instrument the sum recoverable on them was reduced or limited, and that only a less sum than that claimed was owing. The respondent, however, gave no evidence at the trial in support of his pleaded defence, and the judgment for the sum appearing to be due on the face of the deeds was, therefore, inevitable. It was, however, said that an action of improbation of the mortgage deeds had been commenced before the trial, and that by the Code the mortgage suit should have been stayed until that action had been tried and decided. The pleadings in this improbation action are not before their Lordships, and are not even included in the record of the mortgage suit which has been sent to the registrar. Their Lordships, therefore, could not take any notice of it if they heard the appeal, and, there being no evidence for the present respondent, they could do nothing but affirm the decree of the Royal Court. They ought, however, to add that it does not appear from the description of the action in the former petition that it was such an action as would necessarily operate as a stay of proceedings in the principal suit. The Chief Justice in his affidavit says that it raised only the same points as were raised in the defence, and might have been brought forward at the trial if the respondent

had been prepared to do so. Their Lordships have come to the conclusion that no substantial point is raised in the appeal either in the separation suit or in the mortgage suit.

Leave to appeal to the King in Council in formâ pauperis is not of course, and in the opinion of their Lordships it ought not to be granted where it is made apparent that the proposed appeal is idle and frivolous. It would be wrong to put parties to the expense of opposing such an appeal in a case where they could not recover any costs if successful. But in saying this their Lordships do not intend to invite a premature discussion of the merits of the case on a petition to discharge an order to appeal in formâ pauperis, nor will they entertain an application of that character. Usually the statement of counsel shewing that there is a real question to be argued should be received, and it is enough if there be such a question, although the success of the proposed appellant may be doubtful.

In the present case their Lordships are satisfied on the materials before them that there is no question to be tried in either suit, and if the facts had been as fully before them when they advised the Crown to make the order as they are now, the order would not have been made. They have, therefore, humbly advised His Majesty that the Order in Council of June 29, 1900, should be discharged. The petitioner does not ask for costs.

The respondent suggested that their Lordships might grant a new trial on the ground of the bias said to have been exhibited against him by the Chief Justice. They could, of course, after hearing the appeals, direct a remand if they considered that justice required that course. But it would have to be shewn that there had been a serious miscarriage of justice. In the present case nothing of the kind appears. The question in each suit was purely one of fact, and there are no grounds for saying that the judgments were wrong on the materials before the Court, or that the respondent was prevented from adducing further evidence if he had been so minded.

Solicitors for petitioner: *H. J. & T. Child.*
Solicitors for appellant: *Hutchinson & Cuff.*

J. C.*
1901
May 15, 16;
July 13.

[PRIVY COUNCIL.]

In re HENDERSON'S PATENT.

Prolongation—Petition by Assignees—Expiration of Foreign Patents.

Where the petitioners were assignees and purchasers of a British patent as a commercial speculation, and their accounts did not disclose with any clearness the extent of the profits made either by the inventor or the petitioners:—

Held, that prolongation must be refused, although the invention was one of great merit and worthy of exceptional consideration.

Hopkinson's Patent, [1897] A. C. 249, followed.

Saxby's Patent, (1870) L. R. 3 P. C. 292, followed.

Held, further, that the expiration of the foreign patents for the same invention and the failure of the British patentee to push the invention in this country for the first seven years of the life of the patent were serious though not in themselves conclusive objections to a prolongation.

Semet and Solvay's Patent, [1895] A. C. 78, followed.

THIS was a petition by the British Aluminium Company, Limited, for the extension of a patent, No. 7426 of 1887, dated May 21, 1887, and granted to Arthur Charles Henderson for an invention of "an improved process for the preparation of aluminium by electrolysis" (being a communication from Paul Louis Toussaint Héroult). It alleged that the petitioners were assignees thereof; that prior to the grant Héroult had spent large sums in experiments which led to the invention, which, by reducing the cost of production, had rendered aluminium a metal which can be used in all classes of manufactures; that the company was incorporated on May 7, 1894, and prior thereto the patent had not been worked in this country; that thereafter the company obtained various costly rights and properties and proceeded with the construction of the necessary works, which were of such magnitude that the whole of 1895 and 1896 were occupied therein, and it was only in 1897 that profits began to be realized. Patents had been obtained in France and Belgium, of which the latter were

* *Present:* LORD MACNAGHTEN, LORD DAVEY, LORD ROBERTSON, LORD LINDLEY, and SIR FORD NORTH.

never worked and the former were sold. The petitioners submitted that neither they nor the inventor had received adequate remuneration, and stated that if a prolongation were granted they intended to make proper provision (in oral argument it was stated to be 400*l.*) for further remunerating Héroult out of future profits.

Fletcher Moulton, K.C., Wallace, K.C., and *J. C. Graham,* for the petitioners, referred to *Berry's Patent* (1), and submitted that the company had done meritorious work in introducing the patent to the British public, and in establishing with considerable outlay works on a large scale so as to bring down the prices of aluminium, and that therefore they were to be considered in as favourable a light as if they had been the actual inventors. They contended that the time when the public began to take the invention up was the date of its real birth, and not the date of the publication of the patent, more particularly where large capital was required to support it. Although the patentee for seven or eight years had done nothing to provide the British public with the patented article, he had done his best to get the invention taken up.

The Attorney-General (Sir R. Finlay), and *Sutton,* for the Crown, admitted that the invention was highly meritorious, but opposed the petition, first, on the ground of the seven years' delay in working the patent: see *Pieper's Case* (2) and *Dolbear's Case* (3); second, on the ground that the petitioners were assignees not entitled to the consideration due to the original inventor: see *Hopkinson's Patent* (4) and *Bower Barff Patent.* (5) It had not been shewn that the inventor had been inadequately remunerated. Then the foreign patents had expired: see, as to the effect of that, *Pieper's Case* (2) and *Semet and Solvay's Patent.* (6)

Cripps, K.C., and *Walter,* for the Pittsburgh Reduction Company of America, submitted that there was no explanation

(1) (1850) 7 Moore, 187.
(2) (1895) 12 Rep. Pat. Cas. 292.
(3) (1896) 13 Rep. Pat. Cas. 203.
(4) [1897] A. C. 249.
(5) [1895] A. C. 675.
(6) [1895] A. C. 78.

J. C. 1901

HENDERSON'S PATENT, *In re.*

of the seven years' inaction; and, on the question of accounts, that they did not disclose the profits attributable to the patent: *Saxby's Patent* (1); *Lake's Patent.* (2)

Waggett, for Dennis & Co., cited *Carmont's Case.* (3)

July 13. The judgment of their Lordships was delivered by

LORD DAVEY. The letters patent which are the subject of this petition bear date May 21, 1887, and are for the invention of "an improved process for the preparation of aluminium by electrolysis." The inventor was a French gentleman named Héroult, who also obtained patents for his invention in France and in Belgium. Both of these patents have expired.

The French patent was sold to a French company called in the petition the Froges Company. The British patent was sold to a Swiss company, who afterwards sold it to another Swiss company called the Neuhausen Company. The Belgian patent has never been worked. Until the purchase of the British patent by the present petitioners it was not worked in this country, and no serious attempt was made to introduce the invention into this country.

The present petitioners, who are an English company, purchased the patent from the Neuhausen Company in the year 1894 as a commercial speculation. They have since erected works for the manufacture on a large scale of aluminium, and have manufactured and sold that article, but it is alleged that the financial results have not come up to their legitimate expectations. The inventor of the patented invention has no interest direct or indirect in the success of the petitioners' business, but it is stated in the petition that in the event of His Majesty being graciously pleased to prolong the letters patent the petitioners intend to make some provision for the future remuneration of the inventor out of their future profits.

It is admitted that the invention is one of great merit, and would be not unworthy of exceptional consideration if the circumstances of the case were more favourable. The Attorney-

(1) L. R. 3 P. C. 292. (2) [1891] A. C. 240.
(3) (1897) 14 Rep. Pat. Cas. 239.

General has stated several objections to the prolongation of the letters patent, which are in substance as follows:—

(1.) The position of the petitioners as assignees and purchasers of the patent as a commercial speculation.

(2.) That the statements in the petition and accompanying accounts do not supply any clear account of the profits made by the inventor, or even of those made by the petitioners themselves.

(3.) That no real attempt was made to introduce the patented article into this country for the first seven years of the life of the letters patent.

(4.) The expiration of the foreign patents.

Their Lordships think that these objections are well founded, and they have already intimated that this is not a case in which they can properly or consistently with established principles advise His Majesty to grant any prolongation of the letters patent.

The position of assignees who petition for a prolongation of letters patent has frequently been the subject of decision by this Board, and the circumstances in which alone such an application will be entertained are not doubtful. In the recent cases of the *Bower Barff Patent* (1) and *Hopkinson's Patent* (2) their Lordships, following earlier decisions of this Board, affirmed the principle that an assignee who has acquired a patent as the subject of commercial adventure is not entitled to a prolongation when the inventor himself could have no legitimate interest in making such an application. And in the latter case their Lordships referred to judgments of this Board delivered by Lord Langdale and Lord Romilly pointing out the distinction between an assignee who has assisted a patentee with funds to enable him to bring out his invention and one who has merely purchased the patent as a commercial adventure.

Their Lordships need not consider whether it is sufficient for the petitioners merely to state in their petition that they are willing to do something for the inventor as an inducement to the Board to advise the grant of a prolongation or (in other

(1) [1895] A. C. 675. (2) [1897] A. C. 249.

J. C. 1901

HENDERSON'S PATENT, *In re.*

words) as the price they are willing to pay for the grant. They need not do so, because they are of opinion that there is no clear or satisfactory evidence before them that the inventor has not been adequately remunerated. Persons who apply to this Board for the prolongation of letters patent cannot be too frequently reminded of the law as laid down by Lord Cairns in *Saxby's Patent* (1): "It is the duty of every patentee who comes for the prolongation of his patent to take upon himself the onus of satisfying this Committee in a manner which admits of no controversy what has been the amount of remuneration which in every point of view the invention has brought to him, in order that their Lordships may be able to come to a conclusion whether that remuneration may fairly be considered as a sufficient reward for his invention, or not. It is not for this Committee to send back the accounts for further particulars, nor to dissect the accounts for the purpose of surmising what might be their real outcome if they were differently cast; it is for the applicant to bring his accounts before the Committee in a shape which will leave no doubt as to what the remuneration has been which he has received."

The words of Lord Cairns are equally applicable where, as in the present case, the petitioners are bound to prove that the inventor has not been adequately remunerated. It may be surmised from the materials before their Lordships that the inventor has received or become entitled to receive something like 600,000 frs. or (say) 24,000*l.* for his patent rights, besides other advantages in the form of shares which may or may not be of value. But whether that be so or not, it is sufficient for the present purpose to say that the accounts are not before their Lordships in a shape which enables them to form any clear opinion on the subject.

What has been said renders it unnecessary to consider the other points mentioned by the Attorney-General. Their Lordships will only say that the failure of the patentee to push the patented invention in this country for seven years and the circumstance of the expiration of the foreign patents are also serious obstacles to the success of the present application.

(1) L. R. 3 P. C. 292.

Neither of these circumstances would be in itself conclusive against the petitioners. But it would require a very strong case to induce their Lordships to recommend a prolongation of the patent where these circumstances occur. The principle upon which objections of this class should be dealt with are explained in the judgments of this Board in *Semet and Solvay's Patent* (1) (where the extension was granted), and *Pieper's Patent* (2), where it was refused.

For these reasons their Lordships have humbly advised His Majesty that the petition should be dismissed. The petitioners will pay one set of costs to the two objectors.

Solicitors for petitioners: *Wilson, Bristows & Carpmael.*

Solicitors for opponents: *Rowcliffes, Rawle & Co.; Van Sandau & Co.*

(1) [1895] A. C. 78. (2) 12 Rep. Pat. Cas. 292.

The Mode of Citation of the Volumes of the *Law Reports*, commencing January 1, 1901, will be as follows :—

In the First Series,
[1901] 1 Ch. [1901] 2 Ch.

In the Second Series,
[1901] 1 K. B. [1901] 2 K. B. [1901] P.

In the Third Series,
[1901] A. C.

INDEX.

ACT OF BANKRUPTCY—Foreigner—"Debtor" — Assignment executed abroad for benefit of creditors generally - 102
See BANKRUPTCY.

ACTION—*Cause of Action—Conspiracy—Inducing a Person to break his Contract or not to deal with Another or continue in his Employment—Intent to injure—Interference with Trade—Trade Union — Trade Dispute between Employers and Workmen—Conspiracy and Protection of Property Act*, 1875 (38 & 39 *Vict. c.* 86), *ss.* 3, 7.

A combination of two or more, without justification or excuse, to injure a man in his trade by inducing his customers or servants to break their contracts with him or not to deal with him or continue in his employment is, if it results in damage to him, actionable.

The Conspiracy and Protection of Property Act, 1875, c. 86, s. 3, has nothing to do with civil remedies.

The words "trade dispute between employers and workmen" in s. 3 of that Act do not include a dispute on trade union matters between workmen who are members of a trade union and an employer of non-union workmen who refuses to employ members of a trade union.

Semble, the words are restricted to disputes between an employer and his own workmen.

Temperton v. *Russell*, [1893] 1 Q. B. 715, is not overruled as to the decision by *Allen* v. *Flood*, [1898] A. C. 1, but the dicta and reasoning of Lord Esher M.R. cannot be supported.

Allen v. *Flood* explained and its real effect stated.

The decision of the Irish Court of Appeal, *Leathem* v. *Craig*, [1899] 2 I. R. 667, affirmed.
(QUINN *v.* LEATHEM - - H. L. (I.) 495

ADMISSIBILITY—Evidence—Lunacy — Decree absolute for default—Reasonable excuse for default - - - - 601
See PRIVY COUNCIL APPEALS. 4.

AFFIDAVITS—Admissibility — Issue as to appealable value to be decided by Court of Appeal - - - - 581
See PRIVY COUNCIL APPEALS. 14.

AGENT.
See PRINCIPAL AND AGENT.

AGREEMENT.
See CONTRACT.

AGRICULTURAL HOLDINGS (SCOTLAND) — Market Gardeners Compensation (Scotland) Act, 1897—Improvements—Retrospective effect of statute - - 297
See LANDLORD AND TENANT.

AMENDMENT — Patent — Specification — Prior publication or user—Renewal fees 142
See PRIVY COUNCIL APPEALS. 2.

ANNUITY—Income tax — Deduction of, from interest or annuities - - 26
See REVENUE. 2.

APPEAL—Issue as to appealable value to be decided by the Court of Appeal—Admissibility of affidavits - - 581
See PRIVY COUNCIL APPEALS. 14.

—— Leave to appeal in formâ pauperis—Order granting leave discharged - 612
See PRIVY COUNCIL APPEALS. 17.

—— New trial—Appeal to House of Lords—Competency - - - 266
See DIVORCE.

—— Special leave to appeal—Victoria Lunacy Act, 1900—Construction - - 128
See PRIVY COUNCIL APPEALS. 18.

—— Workmen's compensation—Appeal to House of Lords from Scotland—Competency.
See EMPLOYER AND WORKMAN. 1. 269

ASSESSMENT—Poor-rate—Net annual value—Rent of hypothetical tenant - 175
See RATES.

—— Tramway — Separate assessment of tramway engine-house—Rateability—Appeal from Victoria - - - 153
See PRIVY COUNCIL APPEALS. 21.

ASSIGNEES — Patent — Prolongation — Petition by assignees — Expiration of foreign patents - - - - 616
See PATENT.

ATTESTING—Wills, Execution of—Notary present without attesting—Appeal from Ceylon - - - - 354
See PRIVY COUNCIL APPEALS. 5.

AUSTRALIA—Laws of - - 142, 347
See PRIVY COUNCIL APPEALS. 1, 2.

BANKER—*Cheque—Defective Title—Receiving Payment for a Customer—"Customer"—Liability of Banker—Bills of Exchange Act*, 1882 (45 & 46 *Vict. c.* 61), *ss.* 81, 82.

To make a person a "customer" of a bank within the meaning of s. 82 of the Bills of Exchange Act, 1882, there must be some sort of account, either a current or a deposit account, or some similar relation.

H. having by false pretences obtained from the appellants a cheque crossed "& Co." and marked "not negotiable," took it to the respondent bank. The bank at his request paid part of the amount of the cheque into the account of one of their customers and handed the balance to H. After the respondents had received payment of the cheque from the bank on which it was drawn H.'s fraud was discovered, and the appellants sued the respondents for the amount. It was found as a fact that the respondents received the payment in good faith and without negligence. They had for years been in the habit of cashing cheques for H. in a similar manner. He had no account or pass-book with them:—

Held, that H. was not a "customer" of the respondents, and that they did not receive payment of the cheque for him, within the meaning of s. 82 of the Bills of Exchange Act, 1882, and were not protected by that section; that H. having no title to the cheque the respondents took no title to it or to the money, and were liable to the appellants for the amount of the cheque.

The decisions of Bigham J., [1899] 2 Q. B. 172, and the Court of Appeal, [1900] 2 Q. B. 464, reversed. GREAT WESTERN RAILWAY COMPANY *v.* LONDON AND COUNTY BANKING COMPANY
H. L. (E.) 414

—— Director—Misfeasance—Payment of dividends out of capital—Negligence 477
See COMPANY.

BANKRUPTCY—*Jurisdiction—Foreigner resident Abroad but Trading in England—Act of Bankruptcy—"Debtor"—Assignment executed Abroad for Benefit of Creditors generally—Notice of Suspension of Payment—Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 4, *sub-s.* 1 (*a*), (*h*); *s.* 6, *sub-s.* 1 (*d*).

The Court of Bankruptcy has no jurisdiction to make a receiving order against a foreigner resident abroad who, without coming into the jurisdiction, has in this country had a place of business, contracted debts, and acquired assets, and has executed abroad an assignment of his property for the benefit of his creditors generally. Such a person is not "a debtor" within the meaning of the Bankruptcy Act, 1883, s. 6, sub-s. 1 (*d*).

The decision of the Court of Appeal, reported as *In re A. B. & Co.*, [1900] 1 Q. B. 541, affirmed. COOKE *v.* CHARLES A. VOGELER COMPANY
H. L. (E.) 102

BIGAMY—*Second Marriage performed Abroad—Offences against the Person Act*, 1861 (24 & 25 *Vict. c.* 100), *s.* 57.

By the Offences against the Person Act, 1861, s. 57, "Whosoever being married shall marry any other person during the life of the former husband or wife, whether the second marriage shall have taken place in England or Ireland or elsewhere, shall be guilty of felony":—

Held, that the section extends to a case where the second marriage is celebrated beyond the King's dominions. TRIAL OF EARL RUSSELL
Before the King in Parliament. H. L. 446

BILL OF EXCHANGE—Cheque—Defective title—Receiving payment for a "customer"—Liability of banker - - 414
See BANKER.

BILL OF LADING—Waiver of lien for chartered freight - - - 462
See INSURANCE, MARINE.

BREACH OF TRUST—Partnership—Discharge—Liability of retired partners for trust debt - - - - - 282
See TRUSTEE.

BUILDINGS—Height of—Workmen's Compensation Act—"Construction" or repair—"Scaffolding" - - - 49
See EMPLOYER AND WORKMAN. 4.

—— Lands taken for public purposes—Compensation—Appeal from Zanzibar - 373
See PRIVY COUNCIL APPEALS. 22.

CANADA—Quebec—Contract—Construction—Agency - - - - 327
See PRIVY COUNCIL APPEALS. 3.

CASES—*A. B. & Co., In re*, [1900] 1 Q. B. 541, affirmed - - - - 102
See BANKRUPTCY.

—— *Allen* v. *Flood*, [1898] A. C. 1, explained
See ACTION. 495

—— *Anderson* v. *Morice*, (1874) L. R. 10 C. P. 58, approved - - - - 362
See PRIVY COUNCIL APPEALS. 10.

—— *Attorney-General* v. *Dodington*, [1897] 2 Q. B. 373, approved - - 208
See REVENUE. 1.

—— *Collett* v. *London and North Western Ry. Co.*, (1851) 16 Q. B. 984, explained - 396
See PRIVY COUNCIL APPEALS. 9.

—— *Flowers* v. *Chambers*, [1899] 2 Q. B. 142, disapproved - - - 404
See EMPLOYER AND WORKMAN. 3.

—— *Hopkinson's Patent*, [1897] A. C. 249, followed - - - - 616
See PATENT.

—— *Merrill* v. *Wilson*, [1901] 1 K. B. 35, approved - - - - 404
See EMPLOYER AND WORKMAN. 3

—— *Parker* v. *Felgate*, (1883) 8 P. D. 171, approved - - - - 354
See PRIVY COUNCIL APPEALS. 5.

—— *Pimlico, &c., Tramway Co.* v. *Greenwich Union*, (1873) L. R. 9 Q. B. 9, approved
See PRIVY COUNCIL APPEALS. 21. 153

CASES—*continued*

—— *Saxby's Patent*, (1870) L. R. 3 P. C. 292, followed - - - - 616
See PATENT.

—— *Scully* v. *Murn*, (1893) 14 N. S. W. R. 289, overruled - - - - 581
See PRIVY COUNCIL APPEALS. 14.

—— *Semet and Solvay's Patent*, [1895] A. C. 78, followed - - - - 616
See PATENT.

—— *Smelting Company of Australia, Limited* v. *Inland Revenue Commissioners*, [1897] 1 Q. B. 175, commented on - 217
See REVENUE. 3.

—— *Temperton* v. *Russell*, [1893] 1 Q. B. 435, reflected on - - - - 1
See PRACTICE. 2.

—— *Temperton* v. *Russell*, [1893] 1 Q. B. 715, not overruled by *Allen* v. *Flood*, [1898] A. C. 1 - - - - 495
See ACTION.

—— *Wi Parata* v. *Bishop of Wellington*, 3 N. Z. J. R. (N.S.) S. C. 72, considered 561
See PRIVY COUNCIL APPEALS. 16.

CEYLON—Laws of - - - 354, 601
See PRIVY COUNCIL APPEALS. 4, 5.

CHARTERPARTY—Waiver of lien for chartered freight - - - - 462
See INSURANCE, MARINE.

CHEQUE—Defective title—Receiving payment for a "customer"—Liability of banker
See BANKER 414

CLASS—Gift to "A. and the children of B."—Death of A. in testator's lifetime—Intention of testator - - 187
See WILL.

—— Parties—Representative action—Action on behalf of a class of the public—Joinder of plaintiffs - - - - 1
See PRACTICE. 2

COLLISION—Negligence - - - 597
See PRIVY COUNCIL APPEALS. 6.

COMPANY — *Director—Misfeasance — Payment of Dividends out of Capital—Banking Company — Advances on improper Security — Duty of Director—Negligence.*

A director of a joint stock banking company in assenting to the payment of dividends out of capital and to advances on improper security honestly relied on the judgment, information, and advice of the chairman and general manager of the bank, by whose statements he was misled and whose integrity, skill, and competence he had no reason for suspecting:—

Held, that upon the true view of the facts he was not negligent of his duties as director and was not liable in the winding-up.

The decision of the Court of Appeal, *In re National Bank of Wales, Limited*, [1899] 2 Ch. 629, affirmed, their Lordships reserving their opinion upon the question of the payment of dividends out of capital discussed by the Court of Appeal, and Lord Davey expressing dissent from some of the propositions. DOVEY AND METROPOLITAN BANK (OF ENGLAND AND WALES), LIMITED *v.* CORY - - H. L. (E.) 477

COMPANY—*continued.*

—— Calls paid by registered owner of shares—Liability of beneficial owner — Indemnity - - - - 118
See PRIVY COUNCIL APPEALS. 8.

—— Income tax—Investments by company in the Colony—Taxable income—Appeal from Victoria - - - 340
See PRIVY COUNCIL APPEALS. 19.

COMPENSATION—Lands taken for public purposes—Appeal from Zanzibar - 373
See PRIVY COUNCIL APPEALS. 22.

—— Lease—Suspension of pastoral lease—Law of New South Wales - - 588
See PRIVY COUNCIL APPEALS. 13.

—— Market Gardeners Compensation (Scotland) Act, 1897—Improvements—Retrospective effect of statute - - 297
See LANDLORD AND TENANT.

—— Salvage—Injury to salving vessel—Onus probandi - - - - 549
See PRIVY COUNCIL APPEALS. 7.

—— Workmen's Compensation Act
See Cases under EMPLOYER AND WORKMAN.

COMPETENCY—Appeal to House of Lords—New trial - - - - 266
See DIVORCE.

—— Appeal to House of Lords from Scotland—Workmen's compensation - - 269
See EMPLOYER AND WORKMAN. 1.

CONSPIRACY AND PROTECTION OF PROPERTY—Trade dispute between employers and workmen—Cause of action - 495
See ACTION.

CONSTANTINOPLE—Appeals from - 549, 597
See PRIVY COUNCIL APPEALS. 6, 7.

CONTRACT—Agency—Construction of contract—Appeal from Canada - - 327
See PRIVY COUNCIL APPEALS. 3

—— Agent—Sale of goods—Undisclosed principal—Ratification - - - 240
See PRINCIPAL AND AGENT.

—— Railway—Agreement to construct a railway jointly—Construction—Rights of joint owners - - - - 554
See PRIVY COUNCIL APPEALS. 15.

—— Stamp—Goodwill—Agreement "made" in the United Kingdom - - 217
See REVENUE. 3.

COSTS — Security for—Practice as to—Appeal from Victoria - - - 153
See PRIVY COUNCIL APPEALS. 21.

COUNTY COURT—Mandamus to county court to state case—Practice as to security for costs—Tramway—Appeal from Victoria
See PRIVY COUNCIL APPEALS. 21. 153

CROWN—Native title to possession of land—Jurisdiction as to cession to the Crown
See PRIVY COUNCIL APPEALS. 16. 561

CROWN LANDS—Inquiry as to falsity of statements by applicant for conditional purchase—Appeal from New South Wales
See PRIVY COUNCIL APPEALS. 12. 315

"CUSTOMER"—Cheque—Defective title—Receiving payment for a "customer"—Liability of banker - - 414
See BANKER.

CUSTOMS AND INLAND REVENUE.
See Cases under REVENUE.

"DEBTOR"—Foreigner—Assignment executed abroad for benefit of creditors generally
See BANKRUPTCY. 102

DECEIT—*Action for Passing Off—Calculated to Deceive—Functions of Judge and Witness respectively.*
Observations by Lord Macnaghten on the respective functions of judge and witness in passing-off cases. PAYTON & Co. *v.* SNELLING, LAMPARD & Co. - - - H. L. (E.) 308

DEDUCTION—Income tax from interest or annuities - - - - - 26
See REVENUE. 2.

DEFAULT—Decree absolute for—Reasonable excuse for default—Lunacy—Admissibility - - - - 601
See PRIVY COUNCIL APPEALS. 4.

DIGNITY—Married woman—Title of honour—Marriage with a peer of the realm—Divorce—Former wife marrying a commoner - - - - 450
See HUSBAND AND WIFE.

DIRECTOR—Misfeasance—Payment of dividends out of capital—Negligence - 477
See COMPANY.

DISCHARGE—Breach of trust—Liability of retired partners for trust debt - 282
See TRUSTEE.

DISCOVERY—Privilege—Communications between solicitor and client—"Evasion" of statute - - - - 196
See PRACTICE. 1.

DIVIDENDS—Director—Misfeasance—Payment of dividends out of capital—Negligence
See COMPANY. 477

DIVORCE—*Practice—New Trial—Appeal to House of Lords—Competency—Supreme Court of Judicature Act*, 1881 (44 & 45 *Vict. c.* 68), *s.* 9.
By s. 9 of the Supreme Court of Judicature Act, 1881 (44 & 45 Vict. c. 68), ". . . . The decision of the Court of Appeal on any question arising under the Acts relating to divorce and matrimonial causes, ... shall be final except where the decision either is upon the grant or refusal of a decree on a petition for dissolution or nullity of marriage, ... or is upon a question of law on which the Court of Appeal give leave to appeal, and, save as aforesaid, no appeal shall lie to the House of Lords under the said Acts."
Where the Divorce Court has granted a decree nisi after a trial before a jury, and the Court of Appeal has ordered a new trial, an appeal lies to the House of Lords against the order granting a new trial. BUTCHART *v.* BUTCHART
H. L. (D.) 266

—— Bigamy—Second marriage performed abroad - - - - 446
See BIGAMY.

DIVORCE—*continued.*
—— Jurisdiction of Divorce Court—Married woman—Title of honour - - 450
See HUSBAND AND WIFE.

DOCK—Workmen's Compensation Act—Employment on, in, or about a ship in a dock—Factory - - - - 404
See EMPLOYER AND WORKMAN. 3.

DOCUMENTS—Production of—Privilege—Communications between solicitor and client—"Evasion" of statute - - 196
See PRACTICE. 1.

DUTY—Public revenue.
See Cases under REVENUE.

EARNINGS—Workmen's Compensation Act—Average weekly earnings - - 79
See EMPLOYER AND WORKMAN. 2.

EMPLOYER AND WORKMAN—*Appeal to the House of Lords from Scotland—Competency—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *Sched. II., s.* 14 (*c*).
By s. 14 (*c*) of the 2nd schedule to the Workmen's Compensation Act, 1897, which applies to Scotland, "Any application to the sheriff as arbitrator shall be heard, tried, and determined summarily in the manner provided by the fifty-second section of the Sheriff Courts (Scotland) Act, 1876, save only that parties may be represented by any person authorized in writing to appear for them, and subject to the declaration that it shall be competent to either party, within the time and in accordance with the conditions prescribed by act of sederunt, to require the sheriff to state a case on any question of law determined by him, and his decision thereon in such case may be submitted to either Division of the Court of Session, who may hear and determine the same finally, and remit to the sheriff with instruction as to the judgment to be pronounced":—
Held, that in cases within this enactment no appeal lies to the House of Lords from a decision of the Court of Session. OSBORNE *v.* BARCLAY, CURLE & Co. - - - H. L. (Sc.) 269

2. —— *Compensation—"Average Weekly Earnings"—Employment for less than Two Weeks—Factory, Occupier of—Loading and Unloading from Wharf, &c.—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1 (*ii.*) (*a*)—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 1 *sub-s.* 1, *s.* 7 *sub-s.* 2: *First Sched.* (1) (*a*) (*i.*) (*b*).
The right to compensation given by s. 1 of the Workmen's Compensation Act, 1897, is not restricted by the schedule to employments by the week, or for weekly wages, or for two weeks at least. Employment by the day for one or more days is within the Act.
The word "average" in the expression "average weekly earnings" is used loosely and inaccurately in the 1st schedule to the Act.
The decisions of the Court of Appeal, [1900] 1 Q. B. 780, and [1900] 2 Q. B. 95, reversed.
Stevedores were loading a vessel in a dock by means of machinery. The cargo had been put into the hold, and the men employed by the

EMPLOYER AND WORKMAN—*continued.*

stevedores were "finishing off" by slinging iron beams across the hatchway. The machinery having become entangled, one of the workmen went to disentangle it, was caught by it, and injured so that he died:—

Held, by the Earl of Halsbury L.C. and Lords Macnaghten, Shand, Davey, Brampton, and Robertson (Lord Lindley dissenting), that the stevedores were occupying a "factory," namely, the machinery, within the meaning of the Workmen's Compensation Act, 1897, s. 7, sub-s. 2, and the Factory and Workshop Act, 1895, s. 23, sub-s. 1 (ii.), and that the deceased was injured in the course of his employment in loading from the wharf, the process of loading not being complete till the hatchway was secured, within the meaning of those Acts. LYSONS *v.* ANDREW KNOWLES AND SONS, LIMITED. STUART *v.* NIXON & BRUCE - - - **H. L. (E.) 79**

3. —— *Compensation—Employment on, in, or about a Ship in a Dock—Dock—Factory—Factory and Workshop Act*, 1895 (58 & 59 *Vict. c.* 37), *s.* 23, *sub-s.* 1—*Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-ss.* 1, 2.

By the combined effect of the Workmen's Compensation Act, 1897, s. 7, sub-ss. 1, 2, and the Factory and Workshop Act, 1895, s. 23, sub-s. 1, every dock is a factory within the meaning of the Compensation Act, and persons who are in the actual use or occupation of a dock (or, *semble*, of a berth in a dock) and employ workmen in cleaning or repairing a ship in the dock are "undertakers" within the meaning of the Compensation Act, and liable to pay compensation to a workman injured in the course of his employment.

Ship repairers took a ship into a dry dock which they had hired for the purpose of cleaning and repairing the ship. One of their workmen engaged in cleaning the ship was sent to the quay, and while crossing the gangway from the ship to the quay fell into the dock and died of the injury:—

Held, reversing the decision of the Court of Appeal, that the dock was a factory, and the ship repairers were occupiers thereof within the meaning of the Workmen's Compensation Act, 1897, and were liable to pay compensation.

Flowers v. *Chambers*, [1899] 2 Q. B. 142, disapproved; *Merrill* v. *Wilson*, [1901] 1 K. B. 35, approved. RAINE *v.* JOBSON & CO. **H. L. (E.) 404**

4. —— *Compensation—Height of Building—"Construction" or Repair—"Scaffolding"—Workmen's Compensation Act*, 1897 (60 & 61 *Vict. c.* 37), *s.* 7, *sub-s.* 1.

The Workmen's Compensation Act, 1897 (s. 7, sub-s. 1), applies only (inter alia) to employment on, in, or about any building which exceeds thirty feet in height "and is being constructed or repaired by means of a scaffolding."

These words do not confine the employment to the construction or repair of the building as a whole. "Construction" here includes a case where the building has been constructed and believed to be complete, but having been afterwards thought to be faulty and unstable is being strengthened by the addition of stays or supports.

EMPLOYER AND WORKMAN—*continued.*

"Scaffolding" may be external or internal and includes an internal staging arranged with planks and trestles and without poles.

The decision of the Court of Appeal reversed and the award of the county court judge restored ([1899] 1 Q. B. 1018) by Lords Macnaghten, Morris, Davey, and Brampton, Lords Shand and Lindley dissenting. HODDINOTT *v.* NEWTON, CHAMBERS & CO., LIMITED - **H. L. (E.) 49**

—— Conspiracy—Action, Cause of—Trade dispute—Intent to injure - - **495**
See ACTION.

ENGINE-HOUSE—Separate assessment of tramway engine-houses — Rateability—Law of Victoria - - - **153**
See PRIVY COUNCIL APPEALS. 21.

ESTATE DUTY — Exemption — "Any settled property"—"Person competent to dispose" - - - - **208**
See REVENUE. 1.

EVIDENCE — Admissibility — Lunacy — Decree absolute for default—Reasonable excuse for default - - - - **601**
See PRIVY COUNCIL APPEALS. 4.

—— Unseaworthiness — Presumption—Cause of vessel's loss unascertainable - **362**
See PRIVY COUNCIL APPEALS. 10.

EXCISE DUTIES—"Molasses refined in bond"—Law of Victoria - - - **544**
See PRIVY COUNCIL APPEALS. 20.

EXECUTION — Wills — Notary present without attesting—Appeal from Ceylon - **354**
See PRIVY COUNCIL APPEALS. 5.

EXEMPTION—Estate duty—"Any settled property"—"Person competent to dispose"
See REVENUE. 1. **208**

EXPLOSIVES—Railway companies, Liability of—Loss of life from explosives in a railway carriage - - - **396**
See PRIVY COUNCIL APPEALS. 9.

FACTORY — Workmen's Compensation Act — Employment on, in, or about a ship in a dock - - - - - **404**
See EMPLOYER AND WORKMAN. 3.

—— Workmen's Compensation Act — Loading and unloading from wharf, &c. - **79**
See EMPLOYER AND WORKMAN. 2.

FIDEI-COMMISSARY SUBSTITUTION—Will—Direct substitution—Roman-Dutch law
See PRIVY COUNCIL APPEALS. 11. **130**

FINANCE ACT—Estate duty—Exemption **208**
See REVENUE. 1.

FOREIGN PATENTS—Expiration of—Prolongation—Petition by assignees - **616**
See PATENT.

FOREIGNER—Act of bankruptcy—"Debtor"—Assignment executed abroad for benefit of creditors generally - - **102**
See BANKRUPTCY.

FORFEITURE—Lease—Notice of forfeiture to lessee—Appeal from Western Australia
See PRIVY COUNCIL APPEALS. 1. **347**

FORMÂ PAUPERIS—Leave to appeal in—Order granting leave discharged - 612
See PRIVY COUNCIL APPEALS. 17.

FREIGHT—Insurance, Marine—Waiver of lien for chartered freight - - 462
See INSURANCE, MARINE.

GARDENER—Market Gardeners Compensation (Scotland) Act—Improvements—Retrospective effect of statute - - 297
See LANDLORD AND TENANT.

GOLDFIELDS ACT, 1886—Notice of forfeiture of lease to lessee—Appeal from Western Australia - - - - 347
See PRIVY COUNCIL APPEALS. 1.

GOODWILL — Stamp — Agreement for sale — Agreement "made" in the United Kingdom - - - - 217
See REVENUE. 3.

HONG KONG—Company—Calls paid by registered owner of shares — Liability of beneficial owner—Indemnity - 118
See PRIVY COUNCIL APPEALS. 8.

HOUSE OF LORDS—Appeal to—Competency—New trial - - - - 266
See DIVORCE.

—— Appeal to, from Scotland — Competency—Workmen's compensation - - 269
See EMPLOYER AND WORKMAN. 1.

HUSBAND AND WIFE — *Dignity — Title of Honour — Incorporeal Hereditament — Marriage with a Peer of the Realm—Divorce—Former Wife marrying a Commoner—Continued use of Title derived from former Husband — Injunction — Jurisdiction of Divorce Court.*

Where the marriage of a commoner with a peer of the realm has been dissolved by decree at the instance of the wife, and she afterwards, on marrying a commoner, continues to use the title she acquired by her first marriage, she does not thereby, though having no legal right to the user, commit such a legal wrong against her former husband, or so affect his enjoyment of the incorporeal hereditament he possesses in his title, as to entitle him, in the absence of malice, to an injunction to restrain her use of the title.

Only the House of Lords can try questions of right in matters of peerage or dignities connected therewith.

The decision of the Court of Appeal, [1900] P. 305, reversing the judgment of Gorell Barnes J., [1900] P. 118, affirmed. EARL COWLEY *v.* COUNTESS COWLEY - - H. L. (D.) 450

—— Bigamy — Second marriage performed abroad - - - - 446
See BIGAMY.

IMPROVEMENTS—Market Gardeners Compensation (Scotland) Act — Retrospective effect of statute - - - 297
See LANDLORD AND TENANT.

INCOME TAX—Deduction of, from interest or annuities - - - - 26
See REVENUE. 2.

INCOME TAX—*continued.*

—— Investments by company in the Colony—Taxable income—Appeal from Victoria
See PRIVY COUNCIL APPEALS. 19. 340

INCORPOREAL HEREDITAMENT — Title of honour—Married woman—Jurisdiction of Divorce Court—Injunction - 450
See HUSBAND AND WIFE.

INDIA—Railway companies, Liability of—Loss of life from explosives in railway carriage - - - - 396
See PRIVY COUNCIL APPEALS. 9.

INDIAN LAND ACQUISITION ACT, 1894 — Appeal from Zanzibar - - 373
See PRIVY COUNCIL APPEALS. 22.

INJUNCTION—Jurisdiction of Divorce Court—Married woman—Title of honour 450
See HUSBAND AND WIFE.

INSURANCE, MARINE—*On "Freight Chartered or as if Chartered"—Lump Chartered Freight—Loss not by Perils insured against—Cesser of Liability Clause—Loss of Bill of Lading Freight —Waiver of Lien for Chartered Freight.*

Shipowners chartered a ship for a voyage at a lump freight, the charterers' liability to cease upon shipment of the cargo, provided the cargo was worth the freight, dead freight, and demurrage on arrival, and the vessel to have a lien on the cargo for the recovery of all freight, dead freight, demurrage, and all other charges. The shipowners and charterers jointly insured the lump freight "chartered or as if chartered value" at the lump sum "on board or not on board." The charterers loaded the ship with a general cargo, and the master signed bills of lading by which the goods mentioned in each bill were made deliverable upon payment of the bill of lading freight payable in respect of those goods. The aggregate of the bill of lading freight exceeded the chartered freight. On the voyage part of the cargo was lost by jettison upon the ship running aground. The cargo which arrived was worth the freight, dead freight, and demurrage. Owing to the loss of cargo the bill of lading freight payable on the cargo delivered was less than the chartered freight. To recover the difference an action was brought on the policy by the shipowners and charterers jointly:—

Held, that the action was not maintainable, the loss having been caused not by perils of the sea, but by the master's not having reserved in the bills of lading the lien over the whole cargo for the chartered freight.

The decision of the Court of Appeal (reported as *Brankelow Steamship Co.* v. *Canton Insurance Office*, [1899] 2 Q. B. 178), affirmed. WILLIAMS & CO. AND BRANKELOW STEAMSHIP COMPANY *v.* CANTON INSURANCE OFFICE, LIMITED H. L. (E.) 462

INTEREST—Income tax — Deduction of, from interest or annuities - - 26
See REVENUE. 2.

JOINDER — Parties — Representative action — Action on behalf of a class of the public —Joinder of plaintiffs - - 1
See PRACTICE. 2.

JOINT OWNERS—Rights of—Agreement to construct a railway jointly—Construction - - - - - - 554
See PRIVY COUNCIL APPEALS. 15.

JUDGE—Functions of judge and witness respectively—Action for passing off - 308
See DECEIT.

JURISDICTION—Act of bankruptcy—Foreigner—"Debtor"—Assignment executed abroad for benefit of creditors generally
See BANKRUPTCY. 102

—— Divorce Court—Married woman—Title of honour—Injunction - - 450
See HUSBAND AND WIFE.

—— Native title to possession of land—Jurisdiction as to cession to the Crown - 561
See PRIVY COUNCIL APPEALS. 16.

LAND—Crown lands—Inquiry as to falsity of statements of applicant for conditional purchase—Appeal from New South Wales - - - - 315
See PRIVY COUNCIL APPEALS. 12.

—— Lands taken for public purposes—Compensation—Appeal from Zanzibar - 373
See PRIVY COUNCIL APPEALS. 22.

—— Native title to possession of land—Jurisdiction as to cession to the Crown—Appeal from New Zealand - - 561
See PRIVY COUNCIL APPEALS. 16.

LANDLORD AND TENANT—*Compensation for Improvements—Retrospective Effect of Statute—Agricultural Holdings (Scotland) Act*, 1883 (46 & 47 *Vict. c.* 62)—*Market Gardeners Compensation (Scotland) Act*, 1897 (60 & 61 *Vict. c.* 22), *s.* 4.

The Market Gardeners Compensation (Scotland) Act, 1897, is not retrospective, and does not entitle tenants under leases current at the commencement of the Act to compensation in respect of market-garden improvements executed prior to the commencement of the Act.

Decision of Ct. of Sess., (1900) 2 F. 1140, affirmed. SMITH *v.* CALLANDER H. L. (Sc.) 297

—— Lease—Forfeiture—Notice of forfeiture to lessee—Appeal from Western Australia
See PRIVY COUNCIL APPEALS. 1. 347

—— Lease—Suspension of pastoral lease—Compensation - - - - 588
See PRIVY COUNCIL APPEALS. 13.

LEASE.
See LANDLORD AND TENANT.

LIEN—Insurance, Marine—Waiver of lien for chartered freight - - - 462
See INSURANCE, MARINE.

LUNACY—Evidence—Admissibility—Decree absolute for default—Reasonable excuse for default - - - - 601
See PRIVY COUNCIL APPEALS. 4.

—— Practice—Appeal, Special leave to—Victoria Lunacy Act, 1890—Construction 128
See PRIVY COUNCIL APPEALS. 18.

MANDAMUS—To county court to state case—Appeal from Victoria - - 153
See PRIVY COUNCIL APPEALS. 21.

MARINE INSURANCE—Loss of bill of lading freight—Waiver of lien for chartered freight - - - - 462
See INSURANCE, MARINE.

MARKET GARDENERS COMPENSATION (SCOTLAND) ACT—Improvements—Retrospective effect of statute - - 297
See LANDLORD AND TENANT.

MARRIAGE—Bigamy—Second marriage performed abroad - - - 446
See BIGAMY.

—— Title of honour—Marriage with a peer of the realm—Divorce—Former wife marrying a commoner - - 450
See HUSBAND AND WIFE.

MARRIED WOMAN.
See HUSBAND AND WIFE.

MASTER AND SERVANT.
See Cases under EMPLOYER AND WORKMAN.

MAURITIUS—Shipping—Unseaworthiness—Presumption—Evidence - - 362
See PRIVY COUNCIL APPEALS. 10.

MINE—New South Wales, Laws of 581, 588
See PRIVY. COUNCIL APPEALS. 13, 14.

MISFEASANCE—Director—Payment of dividends out of capital—Negligence 477
See COMPANY.

"MOLASSES REFINED IN BOND"—Victoria Customs and Excise Duties - 544
See PRIVY COUNCIL APPEALS. 21.

NAME—Trade union—Right to sue or be sued in registered name - - - 426
See TRADE UNION.

NATAL—Roman-Dutch law—Will—Direct substitution—Fidei-commissary substitution - - - - - 130
See PRIVY COUNCIL APPEALS. 11.

NATIVE RIGHTS—Native title to possession of land—Jurisdiction as to cession to the Crown - - - - 561
See PRIVY COUNCIL APPEALS. 16.

NEGLIGENCE—Collision—Appeal from Constantinople - - - - 597
See PRIVY COUNCIL APPEALS. 6.

—— Director—Misfeasance—Payment of dividends out of capital - - 477
See COMPANY.

—— Railway companies, Liability of—Loss of life from explosives in a railway carriage
See PRIVY COUNCIL APPEALS. 9. 396

NEW SOUTH WALES—Laws of 315, 554, 581, 588
See PRIVY COUNCIL APPEALS. 12—15.

NEW TRIAL—Appeal to House of Lords—Competency - - - - 266
See DIVORCE.

NEW ZEALAND—Native title to possession of land - - - - - 561
See PRIVY COUNCIL APPEALS. 16.

NOTARY—Present without attesting—Execution of wills—Appeal from Ceylon 354
See PRIVY COUNCIL APPEALS. 5.

NOTICE—Forfeiture of lease—Notice to lessee—Appeal from Western Australia 347
See PRIVY COUNCIL APPEALS. 1.

OFFENCES—Bigamy—Second marriage performed abroad - - - 446
See BIGAMY.

ONUS PROBANDI—Negligence—Liability of railway companies—Loss of life from explosives in a railway carriage - 396
See PRIVY COUNCIL APPEALS. 9.

—— Salvage—Injury to salving vessel—Compensation - - - - 549
See PRIVY COUNCIL APPEALS. 7.

PARTIES—Representative action—Action on behalf of a class of the public—Joinder of plaintiffs - - - - 1
See PRACTICE. 2.

PARTNERSHIP—Breach of trust—Discharge—Liability of retired partners for trust debt - - - - - 282
See TRUSTEE.

PASSING OFF—Action for—Calculated to deceive—Functions of judge and witness respectively - - - - 308
See DECEIT.

PATENT—*Prolongation—Petition by Assignees—Expiration of Foreign Patents.*

Where the petitioners were assignees and purchasers of a British patent as a commercial speculation, and their accounts did not disclose with any clearness the extent of the profits made either by the inventor or the petitioners:—

Held, that prolongation must be refused, although the invention was one of great merit and worthy of exceptional consideration.

Hopkinson's Patent, [1897] A. C. 249, followed.

Saxby's Patent, (1870) L. R. 3 P. C. 292, followed.

Held, further, that the expiration of the foreign patents for the same invention and the failure of the British patentee to push the invention in this country for the first seven years of the life of the patent were serious, though not in themselves objections to a prolongation.

Semet and Solvay's Patent, [1895] A. C. 78, followed. *In re* HENDERSON'S PATENT P. C. 616

—— Prior publication or user—Amendment of specification—Renewal fees—West Australian Patent Act - - 142
See PRIVY COUNCIL APPEALS. 2.

PAYMENT—Cheque—Defective title—Receiving payment for a "customer"—Liability of banker - - - - 414
See BANKER.

POOR-RATE—Assessment—Net annual value—Rent of hypothetical tenant - 175
See RATES.

PRACTICE—*Discovery—Production of Documents—Privilege—Communications between Solicitor and Client—"Evasion" of Statute.*

An information against executors claimed duties under a Colonial statute, alleging that the defendants' testator had not long before his death executed voluntary conveyances of Colonial property "with intent to evade the payment of duty" under the statute. One of the defendants, a member of the firm of solicitors whom the testator had instructed to prepare the conveyances, was ordered to produce the notes and records of these instructions, but objected to do so on the ground that they were privileged communications between solicitor and client for the purpose of obtaining advice:—

Held, first, that the privilege was not lost by the death of the testator; and secondly, that the word "evade" was ambiguous and capable of two meanings, one a perfectly innocent one, and that, without expressing any opinion as to the meaning in which it was used in the statute, there was no proof or even allegation of any fraud or illegality to displace the privilege.

The decision of the Court of Appeal, [1900] 2 Q. B. 163, reversed. BULLIVANT *v.* ATTORNEY-GENERAL FOR VICTORIA - - H. L. (E.) 196

2. —— *Parties—Representative Action—Action on behalf of a Class of the Public—Joinder of Plaintiffs—Joinder of several Causes of Action—Rules of Supreme Court, Order XVI., rr.* 1, 9.

Order XVI., r. 9, which provides for persons suing or being sued as representing a class, is not confined to persons who have or claim some beneficial proprietary right which they are asserting or defending. To justify a person suing in a representative character it is enough that he has a common interest with those whom he claims to represent.

Several plaintiffs sued on behalf of themselves and all others the growers of fruit, flowers, vegetables, roots and herbs within the meaning of the Covent Garden Market Act, 1828, to enforce various preferential rights to stands in the market, which they alleged to have been given to the class of growers by the Act. The defendant was the lord of the market:—

Held, that without prejudging the construction of the Act the plaintiffs had an interest in common, and that the defendant was not entitled to have the action stayed either on the ground that the plaintiffs had no beneficial proprietary right, or that the joinder of plaintiffs claiming separate and different rights under the Act, both personally and as representing a class, would embarrass or delay the trial.

The decision of the Court of Appeal, [1899] 1 Ch. 494, affirmed by Lords Macnaghten, Morris and Killanin, and Shand, the Earl of Halsbury L.C. and Lord Brampton dissenting.

Temperton v. *Russell*, [1893] 1 Q. B. 435, reflected on.

Quære, whether it was necessary to join the Attorney-General as a defendant. DUKE OF BEDFORD *v.* ELLIS - - - H. L. (E.) 1

—— Appeal in formâ pauperis, Leave to—Order granting leave discharged - 612
See PRIVY COUNCIL APPEALS. 17.

—— Appealable value, Issue as to, to be decided by Court of Appeal—Admissibility of affidavits - - - - 581
See PRIVY COUNCIL APPEALS. 14.

PRACTICE—*continued.*

—— Decree absolute for default—Reasonable excuse for default—Lunacy - 601
See PRIVY COUNCIL APPEALS. 4.

—— New trial—Appeal to House of Lords—Competency - - - 266
See DIVORCE.

—— Trade union—Right to sue or be sued in registered name - - - 426
See TRADE UNION.

PRESUMPTION—Unseaworthiness—Evidence—Cause of vessel's loss unascertainable
See PRIVY COUNCIL APPEALS. 10. 362

PRINCIPAL AND AGENT—*Undisclosed Principal—Ratification—Contract—Sale of Goods.*

A contract made by a person intending to contract on behalf of a third party, but without his authority, cannot be ratified by the third party so as to render him able to sue or liable to be sued on the contract, where the person who made the contract did not profess at the time of making it to be acting on behalf of a principal.

The decision of the Court of Appeal, [1900] 1 Q. B. 629, reversed for the reasons there given in the dissenting judgment of A. L. Smith M.R. KEIGHLEY, MAXSTED & CO. *v.* DURANT
H. L. (E.) 240

—— Contract—Construction—Agency — Appeal from Canada - - - 327
See PRIVY COUNCIL APPEALS. 3.

PRIVILEGE—Communications between solicitor and client—"Evasion" of statute 196
See PRACTICE. 1.

PRIVY COUNCIL APPEALS — AUSTRALIA—*Lease, Forfeiture of—Notice of Forfeiture to Lessee—Goldfields Act,* 1886—*Regulations of* 1892, *clauses* 69, 70—*Law of Western Australia.*

The decision of the Governor in Council, under clauses 69 and 70 of the Regulations of 1892, to forfeit a lease granted under the Goldfields Act of 1886, must be unequivocally expressed by some overt act:—

Held, that its transmission to the Warden's office was not such an act, and that the decision did not take effect till the day on which it was notified to the lessee.

The seven days' preferent right granted to the applicant for forfeiture by clause 69 to apply for a lease of part of the forfeited land runs from the date of notification: if exercised before that date, the application is invalid and of no effect.

After the expiry of the seven days the respondents applied for a lease of the same land, which had been included in an invalid previous application; the Governor gazetted his approval thereof, and subsequently cancelled the same on the ground of mistake:—

Held, that the cancellation was ultra vires, and that the Governor was liable in damages to the respondents on their petition of right. MINISTER OF MINES *v.* HARNEY - P. C. 347

2. —— *Patent—Prior Publication or User—Amendment of Specification—Renewal Fees—West Australian Patent Act,* 1888 (52 *Vict. No.* 5) *ss.* 23, 49—*Letters of Registration—Invalidity—Appeal from Western Australia.*

Under the provisions of s. 49 of the West Australian Patent Act, 1888, holders of patents obtained in Great Britain or any other country are enabled to obtain letters of registration in the Colony without the formalities and delay necessary on an application for a patent, but subject to all the incidents and conditions to which letters patent would be subject:—

Held, accordingly, that prior publication, or even prior user of an invention in the Colony after the date of its patent, affects the letters of registration.

The provisions of s. 23, as to "amendment of specification," are made applicable by s. 49 to letters of registration.

Where leave to amend a specification has been neither asked for nor granted, but the registrar has simply recorded an amendment without any jurisdiction to do so, it is invalid.

Renewal fees charged by the 2nd schedule of the Act on letters patent are not payable in respect of the letters of registration. AUSTRALIAN GOLD RECOVERY COMPANY *v.* LAKE VIEW CONSOLS
P. C. 142

3. —— **CANADA** — *Quebec — Contract— Construction—Agency.*

In an action by the appellant for a declaration that he was entitled as purchaser to a conveyance from the respondent of the property in suit:—

Held, on consideration of all its terms and of the surrounding circumstances, that the agreement sued upon was not a vendor and purchaser agreement, but an agency agreement; that the appellant never came under any personal liability, present or future, to purchase, the arrangement contemplated being on behalf of third parties who might thereafter be accepted by the respondent. LIVINGSTONE *v.* ROSS - P. C. 327

4. —— **CEYLON**—*Practice—Ceylon Procedure Code, c.* 12, *s.* 87—*Decree Absolute for Default—Reasonable Excuse for Default—Order of Master in Lunacy—Lunacy Act,* 1890 (53 *Vict. c.* 5), *s.* 116 (*Imperial*)—*Evidence—Admissibility.*

Under the Ceylon Civil Procedure Code, c. 12, s. 87, a decree absolute for default may be set aside if the defendant upon notice to the plaintiff satisfies the Court by good and sufficient evidence that his default was due to accident, or misfortune, or want of due information of the proceedings.

An order of a Master in Lunacy in England under s. 116 of the Lunacy Act, 1890, reciting that the defendant was in the opinion of the master a person of unsound mind, though not so found by inquisition, and authorizing his wife to defend the action, is admissible as primâ facie evidence, and if uncontradicted ought to be regarded as sufficient evidence to justify an order under s. 87. HARVEY *v.* THE KING - P. C. 601

5. —— *Will—Execution of Wills—Ordinance No.* 7 *of* 1840, *s.* 3—*Notary present without Attesting—Testamentary Capacity.*

Ceylon Ordinance No. 7 of 1840, s. 3, requires that a testator's signature shall be made or acknowledged in the presence of a licensed notary public and two or more witnesses duly attesting the execution, or, if no notary be

PRIVY COUNCIL APPEALS—CEYLON—*contd.*

present, then in the presence of five or more witnesses duly attesting:—

Held, that the words "if no notary be present" mean present acting in his notarial capacity.

Where a notary was present but refused to act in that capacity by attesting, and the will was in consequence attested by five witnesses, *held*, that it was validly executed.

Where a testator is of sound mind when he gives instructions for a will, but at the time of signature accepts the instrument drawn in pursuance thereof without being able to follow its provisions, *held*, that he must be deemed to be of sound mind when it is executed.

Parker v. *Felgate*, (1883) 8 P. D. 171, approved. PERERA *v.* PERERA - - **P. C. 354**

6. —— **CONSTANTINOPLE**—*Shipping—Collision—Negligence.*

Held, that the appellant vessel, which was admittedly at fault in taking too sharp a turn across the course of the respondent, was guilty of negligence in not reversing her engines when the respondent gave notice that she would continue her course without alteration. OWNERS OF SS. CHITTAGONG *v.* OWNERS OF SS. KOSTROMA **P. C. 597**

7. —— *Salvage—Injury to Salving Vessel—Compensation—Onus probandi.*

Where the vessel of a salvor has without default on his part been injured in the performance of salvage services, compensation may be awarded to him in respect of the injury so sustained and damages consequent thereon; or the salvage may be assessed on a liberal scale, so as to cover the loss and afford an adequate reward for the services rendered:—

Held, also, that the presumption is that the injury is caused by the necessities of the services, and that the onus probandi is on those who allege default by the salvors. The amount of compensation awarded by the Court below will not be reduced unless it appears to be grossly in excess of what is right. MASTER AND OWNERS OF SS. BAKU STANDARD *v.* MASTER AND OWNERS OF SS. ANGÈLE - - - - **P. C. 549**

8. —— **HONG KONG**—*Company—Calls Paid by Registered Owner of Shares—Liability of Beneficial Owner—Indemnity.*

A party who is sui juris and beneficially entitled to shares which he cannot disclaim is personally bound, in the absence of contract to the contrary, to indemnify the registered holder thereof against calls upon them. It is immaterial whether the beneficial owner originally created the trust by which the registered holder was plainly affected, or accepted a transfer of the beneficial ownership with knowledge of the trust. HARDOON *v.* BELILIOS - - - **P. C. 118**

9. —— **INDIA**—*Railway—Liability of Railway Companies—Loss of Life from Explosives in a Railway Carriage—Negligence — Onus probandi—Appeal from Bengal.*

Railway companies are bound to use proper care and skill in carrying their passengers; they are not liable as common carriers of passengers independently of negligence.

Where a passenger was killed in a railway

PRIVY COUNCIL APPEALS—INDIA—*contd.*

carriage by an explosive illegally introduced into it:—

Held, that the railway company was not liable in damages unless guilty of negligence in permitting the fireworks to be brought into the carriage. As it was not the duty of the company to search every parcel carried by a passenger, the onus was on the plaintiff to shew that the parcels containing the fireworks suggested danger.

Collett v. *London and North Western Ry. Co.*, (1851) 16 Q. B. 984, explained. EAST INDIAN RAILWAY COMPANY *v.* KALIDAS MUKERJEE **P. C. 396**

10. —— **MAURITIUS** — *Shipping — Unseaworthiness— Presumption — Evidence — Cause of Vessel's loss unascertainable.*

Where a vessel capsized and sank in less than twenty-four hours after leaving port without having encountered any storm or other known cause sufficient to account for the catastrophe, there is a presumption of unseaworthiness on which a jury may be directed to act in the absence of evidence. Where evidence is given, all the facts must be considered including the unexplained sinking, and unless it establishes unseaworthiness the defence founded on it must fail.

Anderson v. *Morice*, (1874) L. R. 10 C. P. 58, approved.

The defence in this case was overruled, since the real cause of the loss was not ascertainable on the evidence, though it appeared to be attributable to mistakes made in managing the vessel after she sailed rather than to her unseaworthiness when she sailed. AJUM GOOLAM HOSSEN & Co. *v.* UNION MARINE INSURANCE COMPANY. HAJEE CASSIM JOOSUB *v.* AJUM GOOLAM HOSSEN & Co. - - - - **P. C. 362**

11. —— **NATAL**—*Will—Roman-Dutch Law—Direct Substitution in Favour of Children who survive the Testator's Widow—Heirs of Predeceased Children excluded—Fidei-commissary Substitution.*

Where by will executed in Natal the testator directed that after his wife's death his estate should "be equally divided among my children or such as may be then alive":—

Held, that the children who survived the wife took by direct substitution to the exclusion of the issue of any child who predeceased her. There is no rule of construction in Roman-Dutch law which authorizes children to be read as including grandchildren.

Where a substitution is direct there is no implied condition, under Roman-Dutch law, in favour of the institute, si sine liberis decesserit. But where the substitution is fidei-commissary, such a condition may be annexed to the fidei-commissum, so that unless the condition happens the fidei-commissum does not arise and the substitution fails of effect. GALLIERS *v.* RYCROFT **P. C. 130**

12. —— **NEW SOUTH WALES**—*Crown Lands—Inquiry as to Falsity of Statements by Applicant for Conditional Purchase—Powers of Land Board—Findings of Fact by Land Court final—Power to reserve Points of Law—Jurisdiction of Supreme*

PRIVY COUNCIL APPEALS — NEW SOUTH WALES—*continued.*

Court—Crown Lands Acts, 1884, *ss.* 20, 26; 1889, *ss.* 5, 8, *sub-s.* 6.

A Land Board and a Land Appeal Court having found, on an inquiry directed by the Minister for Lands under s. 20 of the Crown Lands Act of 1884, that certain statements made by the respondent in applying for a conditional purchase were false within the meaning of s. 26:—

Held, on a special case submitted to the Supreme Court under s. 8, sub-s. 6, of the Crown Lands Act of 1889:

(1) that the jurisdiction of the Supreme Court is confined to the decision of submitted questions of law.

(2) that the decision on questions of fact by the Land Board or by the Land Appeal Court is final and conclusive.

(3) that the inquiry directed was within the cognizance of the Land Board under s. 20 of the Act of 1884.

(4) that the Land Appeal Court has power to review the finding of the Land Board, and as incident thereto to reject irrelevant evidence, draw reasonable inferences of fact, correct errors and shortcomings of the Board; to act as a Court of rehearing as well as of appeal.

Under s. 5 of the Act of 1889 and No. 7 of the Crown Lands Regulations of December 2, 1889, the Minister for Lands can order the inquiry to be held at any place that he may think fit. MINISTER FOR LANDS *v.* WILSON - P. C. 315

13. —— *Lease—Suspension of Pastoral Lease—Compensation—New South Wales Mining Act*, 1874 (37 *Vict. No.* 13), *ss.* 13, 25—*Construction.*

Held, that s. 13 of the New South Wales Mining Act of 1874 is plain and unambiguous. It confers on the Governor power to suspend a pastoral lease so far as may be necessary for certain defined purposes relating to the public safety and welfare. That power is not confined to land uncultivated or unimproved, or to water flowing in a natural watercourse. The effect of suspension is that while it lasts, and so far as it extends, all the rights of the lessee derived from the lessor are in abeyance, and the lessor is in the same position as if the lease had never been granted, and accordingly can resume possession. The compensation to which the lessee is entitled is limited to the return or remission of rent, no provision being made for cases where compensation so restricted is inadequate:—

Held, further, that the construction of s. 13 cannot be controlled by s. 25, which relates to a different subject. COOK *v.* RICKETSON P. C. 588

14. —— *Practice — Appealable Value—Issue as to Appealable Value to be decided by Court of Appeal—Admissibility of Affidavits—New South Wales Mining Act*, 1874 (37 *Vict. No.* 13), *s.* 115.

Sect. 115 of the New South Wales Mining Act, 1874, gives a right of appeal to the Supreme Court in mining cases where the amount involved is not less than 500*l.*:—

Held, that the Supreme Court was wrong in refusing to hear an appeal on the ground that the value should be found and stated by the Court appealed from, and could not be ascertained by themselves on affidavit.

Scully v. *Murn*, (1893) 14 N. S. W. R. 289, overruled. FALKNERS GOLD MINING CO. *v.* MCKINNERY - - - - P. C. 581

15. —— *Railway—Agreement to Construct a Railway jointly—Construction—Rights of Joint Owners.*

Where two colliery companies agreed to construct a railway between their respective collieries and the Government railway, and by the New South Wales Act which empowered the same it was provided that the new railway should be open to the public upon payment of a toll to the two companies for every ton of goods carried for the public, and that owners and occupiers of lands traversed by the railway might construct branch railways communicating therewith:—

Held, that, in the absence of prohibitive words in the agreement, either colliery company was at liberty to construct a branch railway and have its coal thence brought to the joint railway carried over it free of the toll, which was chargeable only to the public. CALEDONIAN COAL COMPANY *v.* SEAHAM COLLIERY COMPANY P. C. 554

16. —— NEW ZEALAND—*Native Title to Possession of Land—Land Act of* 1892 (56 *Vict. No.* 37), *ss.* 136, 137—*Jurisdiction as to Cession to the Crown—Native Rights Act*, 1865 (29 *Vict. No.* 11), *ss.* 3, 4, 5.

The Civil Courts have jurisdiction under the Native Rights Act, 1865, ss. 3, 4, 5, to ascertain as therein provided native title to and interest in land according to custom or usage of the Maori people. And they are bound in any action in which such title is involved to recognise the rightful possession and occupation of lands by the natives until lawfully extinguished, and to give effect to it.

The appellant having alleged a native title of occupancy to the lands in suit in a manner which was consistent with the Crown's seisin thereof in fee:—

Held, that his suit to restrain an unauthorized invasion of it was maintainable, and that the Court had jurisdiction to decide at least that the title alleged was in existence and had not been extinguished by cession to the Crown in manner provided by statute, or by other proceeding legally effective for that purpose.

Wi Parata v. *Bishop of Wellington*, 3 N. Z. J. R. (N.S.) S. C. 72, considered.

Quære, whether native title can be extinguished by an exercise of the prerogative.

The respondent as Commissioner of Crown Lands having notified the land in suit under s. 136 of the Land Act of 1892, offered it for sale or selection in terms of s. 137, and advertised the sale thereof:—

Held, that the appellant was entitled to sue for an injunction until his title was extinguished according to law, and the Court had jurisdiction to decide whether the respondent's action was within his statutory powers. NIREAHA TAMAKI *v.* BAKER - - - - P. C. 561

PRIVY COUNCIL APPEALS—*continued.*

17. —— **ST. LUCIA**—*Practice*—*Leave to Appeal in Formâ Pauperis*—*Order granting Leave discharged*—*Appeal from the Royal Court of St. Lucia.*

Leave to appeal to the King in Council in formâ pauperis is not of course, and ought not to be granted where it is made apparent that the proposed appeal is idle and frivolous. An order to that effect discharged when on the application of the respondent it appeared that there was no substantial question to be tried, and where the order would not have been made if all the materials had been before their Lordships. QUINLAN *v.* QUINLAN - - - **P. C. 612**

18. —— **VICTORIA**—*Lunacy*—*Special Leave to Appeal*—*Victoria Lunacy Act*, 1890—*Construction.*

Neither under the Victoria Lunacy Act of 1890 nor under a habeas corpus is a person lawfully detained as a lunatic entitled as of right to have the question of his lunacy decided by means of a jury.

Special leave to appeal from certain orders of Court refused, the petitioner's object being to obtain a jury's decision as to his lunacy. *Ex parte* GREGORY - - - - **P. C. 128**

19. —— *Revenue*—*Income Tax*—*Investments by Company in the Colony*—*Taxable Income*—*Construction*—*Victorian Income Tax Act*, 1895 (58 *Vict. No.* 1374), *ss.* 5, 10.

Sect. 10 of the Victorian Income Tax Act, 1895, provides a special mode of computing taxable income in favour of those companies which, not having their principal office or place of business in Victoria, nevertheless have part of their "receipts or assets and liabilities" within the Colony:—

Held, that by the true construction of that section, the appellant company, in order to have the benefit thereof, must shew that it carries on part of its trade in the Colony; the above expression representing the component parts of a trading company's balance-sheet:

Held, further, that the appellant being a mutual insurance company which did not insure or otherwise trade in the Colony, but only invested certain funds there, was not within the section. Its income derived from its Victorian investments was taxable income under s. 5 in the mode applicable to taxpayers generally. SCOTTISH PROVIDENT INSTITUTION *v.* COMMISSIONER OF TAXES - - - - - **P. C. 340**

20. —— *Revenue*—"*Molasses refined in Bond*"—*Victoria Customs and Excise Duties Act*, 1895 (59 *Vict. No.* 1401), *Schedule*—*Construction.*

Molasses strained and filtered in a bonded warehouse so as to free them from impurities contracted in uncovered tanks, but not involving any chemical change or alteration in colour, taste, or smell, cannot be regarded as "molasses refined in bond" within the meaning of that expression as used in the Victoria Customs and Excise Duties Act, 1895. COLONIAL SUGAR REFINING COMPANY *v.* ATTORNEY-GENERAL FOR VICTORIA **P. C. 544**

21. —— *Tramway*—*Rateability*—*Rateable Value*—*Local Government Act*, 1890 (54 *Vict. No.* 1112), *s.* 246—*Separate Assessment of the Tramway Engine-houses*—*Jurisdiction of Supreme Court*—*Mandamus to County Court to state Case*—*Justices Act*, 1890 (54 *Vict. No.* 1105), *s.* 139—*Practice as to Security for Costs.*

The county court having in appeal materially reduced the respondents' assessment of the appellants' tramway:—

Held, that the Supreme Court had jurisdiction to issue a mandamus directing it to state the facts for their determination.

A decision of the county court in a rate appeal is not final under ss. 60, 61 of Act No. 1243 of 1891. Those sections must be read with and are qualified by s. 139 of No. 1105 of 1890, which in effect enacts that the Court may be required to state a case in "all appeals": an expression which on its true construction includes rating appeals.

Held, also, that the land of the appellants' tramways, though its ownership is vested in the Crown, is occupied by the company and used for the profit of its members, and is rateable property, not falling within the exception in s. 246 of Act No. 1112. The rateable value of its occupation is the gross profit of the concern, from which 10 per cent. on the capital outlay is rightly deducted. That value cannot be affected by the amount of consideration paid to acquire occupation whether in the shape of rent or instalments of purchase-money.

Pimlico, &c., Tramway Co. v. *Greenwich Union*, (1873) L. R. 9 Q. B. 9, approved.

Where a tramway runs through several municipalities, but has its engine-houses in one of them:—

Held, that the separate rating value of the engine-houses taken at 5 per cent. on the fee simple value should be deducted from the rating value of the whole concern and allotted to the municipality in which they stand, and that the remainder of the rating value should be shared among the different municipalities according to the length of the tramway in each. MELBOURNE TRAMWAY AND OMNIBUS COMPANY *v.* MAYOR, &C., OF THE CITY OF FITZROY - - **P. C. 153**

22. —— **ZANZIBAR**—*Lands taken for Public Purposes*—*Zanzibar Order in Council*, 1884—*Indian Land Acquisition Act*, 1894, *s.* 6—*Compensation*—*Incidents of Land governed by the Local Law*—*Mahomedan Law of Compensation*—*Buildings erected by Government on the Plaintiffs' Land without Authority.*

The lands of the plaintiffs in the island of Mombasa, part of the dominions of the Sultan of Zanzibar, were taken for a railway by the British Government under s. 6 of the Indian Land Acquisition Act, 1894, which had been brought into force in Zanzibar by Order in Council.

In a suit for compensation for the value of the land so taken, and also of the buildings previously erected thereon by the said Government without authority:—

Held, (1.) As regards the lands, the plaintiffs are entitled under the said Act to the market value thereof at the date of service of notice, under s. 6, including such actual speculative advance therein as had already taken place in consequence of the railway scheme; but exclud-

PRIVY COUNCIL APPEALS — ZANZIBAR — *continued.*

ing any future speculative advance from the like cause.

(2.) As regards the buildings, English law applied under the Order in Council of 1884 and the subsequent treaty of 1886. By that law, notwithstanding treaty rights of exterritoriality, the lex loci rei sitæ governs the incidents of land, that is in this case Mahomedan law, of which law a Zanzibar judge has judicial cognizance.

(3.) By Mahomedan law the houses did not become the plaintiffs' property. The plaintiffs are entitled to have them removed, and the value to them of the right to have them removed from lands which have ceased to be their property is the measure of the compensation due. SECRETARY OF STATE FOR FOREIGN AFFAIRS *v.* CHARLESWORTH, PILLING & CO. - - - P. C. 373

PRODUCTION OF DOCUMENTS — Privilege — Communications between solicitor and client—"Evasion" of statute - 196
See PRACTICE. 1.

PROLONGATION—Petition by assignees — Expiration of foreign patents - 616
See PATENT.

PUBLICATION—Patent — Prior publication or user — Amendment of specification — Renewal fees — Appeal from Western Australia - - - - 142
See PRIVY COUNCIL APPEALS. 2.

QUEBEC—Contract—Construction—Agency 327
See PRIVY COUNCIL APPEALS. 3.

RAILWAY—Joint owners, Rights of—Agreement to construct a railway jointly—Construction - - - 554
See PRIVY COUNCIL APPEALS. 15.

—— Liability of railway companies—Loss of life from explosives in a railway carriage
See PRIVY COUNCIL APPEALS. 9. 396

RATEABILITY—Tramway—Separate assessment of tramway engine-houses — Law of Victoria - - - - 153
See PRIVY COUNCIL APPEALS. 21.

RATES—*Rent of hypothetical Tenant—Evidence of Profits—Poor-rate—Assessment — Net Annual Value.*

In estimating for the purposes of a poor-rate assessment the rent at which premises may be reasonably expected to let, the circumstances of the actual occupation are matters to be considered, including the receipts and expenses of the business carried on there; although (as in the case of the Mersey Docks and Harbour Board) the occupiers cannot make profits for their own benefit, but are required by statute to apply them to specific purposes.

The decision of the Court of Appeal, [1900] 1 Q. B. 143, affirmed. MERSEY DOCKS AND HARBOUR BOARD *v.* BIRKENHEAD ASSESSMENT COMMITTEE - - - - H. L. (E.) 175

RATIFICATION — Contract — Agent — Sale of goods—Undisclosed principal - 240
See PRINCIPAL AND AGENT.

REGISTRATION — Patent — Invalidity — Prior publication or user — Amendment of specification - - - 142
See PRIVY COUNCIL APPEALS. 2.

—— Trade union—Right to sue or be sued in registered name - - - 426
See TRADE UNION.

REPRESENTATIVE ACTION—Parties — Action on behalf of a class of the public — Joinder of plaintiffs - - 1
See PRACTICE. 2.

REVENUE — *Estate Duty — Exemption — "Any Settled Property"—"Person competent to dispose"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 5, *sub-s.* 2.

By a marriage settlement personal property was settled in trust for the husband for life, after his death for the wife for life, and after the death of the survivor for such persons as the wife by deed or will should appoint. The wife died, having exercised the power of appointment by will. Upon her death estate duty was paid under the Finance Act, 1894, in respect of her expectancy, upon the principal value of the settled property, the value of her husband's life interest being deducted. Upon the husband's death the Crown claimed estate duty again upon the principal value of the settled property. The settlement trustees paid the claim, but afterwards petitioned for a return of the amount, less the value of the husband's life interest, alleging that on his death estate duty became payable (if at all) only on the value of his life interest:—

Held, that estate duty having been paid upon the settled property since the date of the settlement, namely, upon the wife's death, s. 5, sub-s. 2, exempted the settled property from estate duty until the death of a person who was at the time of his death or had been at any time during the continuance of the settlement competent to dispose of the property, and that the husband not being such a person, the trustees were entitled to a return of the amount for which they petitioned, and that if they had claimed the return of the whole sum they had paid upon the husband's death they would have been entitled to it.

The decisions of the Queen's Bench Division and the Court of Appeal in Ireland, [1900] 2 I. R. 281, 400, affirmed upon the grounds given by Pallas C.B.

The judgment of Rigby L.J. in *Attorney-General* v. *Dodington*, [1897] 2 Q. B. 373, approved. INLAND REVENUE COMMISSIONERS *v.* PRIESTLEY - - - - H. L. (I.) 208

2. —— *Income Tax—Deduction of Income Tax from Interest or Annuities—Customs and Inland Revenue Act*, 1888 (51 & 52 *Vict. c.* 8), *s.* 24, *sub-s.* 3.

In paying the dividends on their consolidated stock out of the Consolidated Loans Fund, the London County Council are bound under s. 24, sub-s. 3, of the Customs and Inland Revenue Act, 1888, to account to the Crown for the income tax which they deduct from the dividends, so far only as the dividends are not paid out of their income which has already been charged with income tax.

Where the dividends are paid partly out of

REVENUE—*continued.*
rents and profits from their lands charged with income tax under Sched. A, partly out of interest on loans to local authorities charged with income tax under Sched. D, and (where those receipts are insufficient) partly out of moneys raised by rates, the council are entitled to retain for their own benefit so much of the deduction for income tax which they make on the dividends as is equal to the income tax paid both under Sched. A and Sched. D.

The decision of the Court of Appeal, [1900] 1 Q. B. 192, reversed. LONDON COUNTY COUNCIL *v.* ATTORNEY-GENERAL - - H. L. (E.) 26

3. —— *Stamps—Agreement for Sale—Goodwill—Agreement "made" in the United Kingdom—"Property locally situate out of the United Kingdom"—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 59, *sub-s.* 1.

By s. 59, sub-s. 1, of the Stamp Act, 1891, any contract or agreement "made" in the United Kingdom for the sale of any estate or interest in any property "except lands . . . . or property locally situate out of the United Kingdom . . . ." is chargeable with the same ad valorem duty as if it were a conveyance on sale.

An agreement is "made" in the United Kingdom within the meaning of that section if it is executed in the United Kingdom by a party to the agreement whose execution is required to make the instrument on the face of it complete.

The words "property locally situate out of the United Kingdom" are not confined to realty and may include the goodwill of a business.

An agreement in writing to sell the premises of a wholesale manufacturing business carried on abroad together with the goodwill of the business for a lump sum was executed by the vendor abroad and by the purchaser in England. The vendor covenanted not to engage in any similar trade within fifty miles of the existing premises. All the customers of the business were abroad:—

Held, that the agreement was "made" in England, but (the Earl of Halsbury L.C. dissenting) that the goodwill was "property locally situate out of the United Kingdom" within the meaning of the section, and that the agreement was therefore not chargeable with the ad valorem duty.

The decision of the Court of Appeal, [1900] 1 Q. B. 310, affirmed.

Smelting Company of Australia, Limited v. *Inland Revenue Commissioners*, [1897] 1 Q. B. 175, commented on. INLAND REVENUE COMMISSIONERS *v.* MULLER AND CO.'S MARGARINE, LIMITED. H. L. (E.) 217

—— Income tax—Investments by company in the Colony—Taxable income—Appeal from Victoria - - - - 340
See PRIVY COUNCIL APPEALS. 19.

—— Victoria customs and excise duties—"Molasses refined in bond" - - 544
See PRIVY COUNCIL APPEALS. 20.

ROMAN-DUTCH LAW—Will—Direct substitution—Fidei-commissary substitution
See PRIVY COUNCIL APPEALS. 11. 130

RULES OF SUPREME COURT:—
—— Order XVI., rr. 1, 9—*Parties* - - 1
See PRACTICE. 2.

ST. LUCIA—Practice—Leave to appeal in formâ pauperis — Order granting leave discharged - - - - 612
See PRIVY COUNCIL APPEALS. 17.

SALE OF GOODS — Agent — Contract — Undisclosed principal—Ratification - 240
See PRINCIPAL AND AGENT.

SALVAGE—Injury to salving vessel—Compensation—Onus probandi - - 549
See PRIVY COUNCIL APPEALS. 7.

"SCAFFOLDING" — Workmen's Compensation Act—Height of building—"Construction" or repair - - - 49
See EMPLOYER AND WORKMAN. 4.

SCOTLAND—Appeal to House of Lords from—Competency—Workmen's compensation
See EMPLOYER AND WORKMAN. 1. 269

SECURITY FOR COSTS—Practice as to—Tramway—Appeal from Victoria - 153
See PRIVY COUNCIL APPEALS. 21.

SERVANT—Master and
See cases under EMPLOYER AND WORKMAN.

SHIPPING—Collision—Negligence - 597
See PRIVY COUNCIL APPEALS. 6.

—— Insurance, Marine — Waiver of lien for chartered freight - - - 462
See INSURANCE, MARINE.

—— Salvage—Injury to salving vessel — Compensation—Onus probandi - 549
See PRIVY COUNCIL APPEALS. 7

—— Unseaworthiness —Presumption —Evidence —Cause of vessel's loss unascertainable
See PRIVY COUNCIL APPEALS. 10. 362

—— Workmen's Compensation Act — Employment on, in, or about a ship in a dock—Factory - - - - 404
See EMPLOYER AND WORKMAN. 3.

—— Workmen's Compensation Act—Wharf, &c. —Loading and unloading from—"Factory" - - - - 79
See EMPLOYER AND WORKMAN. 2.

SOLICITOR—Privilege—Production of documents —Communications between solicitor and client—"Evasion" of statute - 196
See PRACTICE. 1.

SPECIFICATION — Amendment — Patent — Letters of registration—Invalidity—Appeal from Western Australia - - 142
See PRIVY COUNCIL APPEALS. 2.

STAMP—Goodwill—Agreement "made" in the United Kingdom - - - 217
See REVENUE. 3.

STATUTE—"Evasion" of statute - - 196
See PRACTICE. 1.

—— Market Gardeners Compensation (Scotland) Act—Retrospective effect of statute
See LANDLORD AND TENANT. 297

STATUTES.

I. Imperial Statutes.

24 & 25 Vict. c. 100, s. 57—*Offences against the Person* - - - - 446
See Bigamy.

34 & 35 Vict. c. 31—*Trade Unions* - 426
See Trade Union.

38 & 39 Vict. c. 86, ss. 3, 7—*Conspiracy and Protection of Property* - - 495
See Action.

39 & 40 Vict. c. 22—*Trade Unions* - 426
See Trade Union.

44 & 45 Vict. c. 68, s. 9—*Judicature* - 266
See Divorce.

45 & 46 Vict. c. 61, ss. 81, 82—*Bills of Exchange*
See Banker. 414

46 & 47 Vict. c. 52, s. 4, sub-s. 1 (*a*), (*h*); s. 6, sub-s. 1 (*d*)—*Bankruptcy* - - 102
See Bankruptcy.

46 & 47 Vict. c. 62—*Agricultural Holdings (Scotland)* - - - - 297
See Landlord and Tenant.

51 & 52 Vict. c. 8, s. 24, sub-s. 3—*Customs and Inland Revenue* - - - 26
See Revenue. 2.

53 Vict. c. 5, s. 116—*Lunacy* - - 601
See Privy Council Appeals. 4.

53 & 54 Vict. c. 39, s. 17, sub-s. 3—*Partnership*
See Trustee. 282

54 & 55 Vict. c. 39, s. 59, sub-s. 1—*Stamps* 217
See Revenue. 3.

57 & 58 Vict. c. 30, s. 5, sub-s. 2—*Finance Act*
See Revenue. 1. 208

58 & 59 Vict. c. 37, s. 23, sub-s. 1—*Factories and Workshops* - - - 404
See Employer and Workman. 3.

—— —— s. 23, sub-s. 1 (ii.), (*a*) - 79
See Employer and Workman. 2.

60 & 61 Vict. c. 22, s. 4—*Market Gardeners Compensation* - - - 297
See Landlord and Tenant.

60 & 61 Vict. c. 37, s. 1, sub-s. 1; s. 7, sub-s. 2; 1st Sched. (1), (*a*), (i.), (*b*)—*Workmen's Compensation* - - - 79
See Employer and Workman. 2.

—— —— s. 7, sub-s. 1 - - - 49
See Employer and Workman. 4.

—— —— s. 7, sub-ss. 1, 2 - - 404
See Employer and Workman. 3.

—— —— Sched. II., s. 14 (*c*) - - 269
See Employer and Workman. 1.

II. Colonial Statutes.

Australia, Statutes of:

Goldfields Act, 1886 - - - 347
See Privy Council Appeals. 1.

Regulations of 1892, clauses 69, 70 - 347
See Privy Council Appeals. 1.

Western Australia, Statutes of:

52 Vict. No. 5, ss., 23, 49—*Patents* - 142
See Privy Council Appeals. 2.

STATUTES—*continued.*

Ceylon, Statutes of:

Ordinance No. 7 of 1840, s. 3 - - 354
See Privy Council Appeals. 5.

Ceylon Procedure Code, c. 12, s. 87 - 601
See Privy Council Appeals. 4.

India, Statutes of:

Indian Land Acquisition Act, 1894, s. 6 373
See Privy Council Appeals. 22.

New South Wales, Statutes of:

37 Vict. No. 13, ss. 13, 25—*Mining* - 588
See Privy Council Appeals. 13.

—— —— s. 115 - - - - 581
See Privy Council Appeals. 14.

Crown Lands Act, 1884, ss. 20, 26 - 315
See Privy Council Appeals. 12.

Crown Lands Act, 1889, ss. 5, 8, sub-s. 6 315
See Privy Council Appeals. 12.

New Zealand, Statutes of:

29 Vict. No. 11, ss. 3, 4, 5—*Native Rights* 561
See Privy Council Appeals. 16.

56 Vict. No. 37, ss. 136, 137—*Land* - 561
See Privy Council Appeals. 16.

Victoria, Statutes of:

Victoria Lunacy Act, 1890 - - 128
See Privy Council Appeals. 18.

54 Vict. No. 1105, s. 139—*Justices* - 153
See Privy Council Appeals. 21.

54 Vict. No. 1112, s. 246—*Local Government*
See Privy Council Appeals. 21. 153

58 Vict. No. 1374, ss. 5, 10—*Income Tax* 340
See Privy Council Appeals. 19.

59 Vict. No. 1401—*Customs and Excise Duties*
See Privy Council Appeals. 20. 544

Zanzibar:

Zanzibar Order in Council, 1884 - - 373
See Privy Council Appeals. 22.

SUBSTITUTION — Roman-Dutch law — Will — Direct substitution — Fidei-commissary substitution - - - - 130
See Privy Council Appeals. 11.

TAXES.
See under Revenue.

TENANT.
See Landlord and Tenant.

TESTAMENTARY CAPACITY — Execution of wills—Notary present without attesting
See Privy Council Appeals. 5. 354

TITLE OF HONOUR—Married woman—Marriage with a peer of the realm—Divorce—Former wife marrying a commoner 450
See Husband and Wife.

TRADE UNION—*Registered Name—Right to sue or be sued in Registered Name—Trade Union Acts*, 1871 (34 & 35 *Vict. c.* 31), *and* 1876 (39 & 40 *Vict. c.* 22).

A trade union, registered under the Trade

TRADE UNION—*continued.*
Union Acts, 1871 and 1876, may be sued in its registered name.
The decision of the Court of Appeal, [1901] 1 K. B. 170, reversed and the decision of Farwell J. restored. TAFF VALE RAILWAY COMPANY *v.* AMALGAMATED SOCIETY OF RAILWAY SERVANTS H. L. (E.) 426

—— Action, Cause of—Conspiracy—Trade dispute between employers and workmen
See ACTION. 495

TRAMWAY—Rateability—Separate assessment of tramway engine-houses - 153
See PRIVY COUNCIL APPEALS. 21.

TRIAL—New trial—Appeal to House of Lords—Competency - - - 266
See DIVORCE.

TRUSTEE—*Breach of Trust—Partnership—Discharge—Liability of Retired Partners for Trust Debt—Partnership Act*, 1890 (53 & 54 *Vict. c.* 39), *s.* 17, *sub-s.* 3.
A power to lend trust money to a firm consisting of certain individuals does not authorize a loan to a firm differently constituted, whether including more individuals or less.
A testator, who had been a partner in the firm of A. and W. Smith & Co., nominated his wife and two of the three remaining partners in the firm as his trustees, and he specially authorized his trustees to allow his share of the capital to remain as a loan to the firm so long as his trustees should think it safe to allow it to remain. The wife died. The amount of the capital was ascertained and continued as a loan to the firm, but without any bond or other obligation being given for it. The third partner, not a trustee, was dissatisfied with the conduct of the firm's business, the result being that he agreed to retire under an agreement by which the two trustee partners paid him a sum of 9000*l.* for his interest in the firm and by which the trustee partners undertook to meet all the liabilities of the firm, take over all the assets, and relieve the third partner of all debts. The new firm was carried on by the two trustee partners under the old name, and it paid a half-year's interest on the debt due to the trust estate. A year after the retirement of the third partner, the trustee partners, as trustees, granted to the old firm and the third partner a discharge of the debt due to the trust. And about a month afterwards the new firm became insolvent and the two partners bankrupt. The trustee partners resigned their trusteeship, and new trustees were appointed, who acted as creditors on the new firm, and received a dividend out of the new firm's assets. They then raised against the retired third partner this action, claiming reduction of the discharge and payment of the balance of the trust debt:—
Held, affirming the decision of the First Division of the Court of Session, (1900) 37 S. L. R. 557, that the discharge was a breach of trust on the part of the trustee partners from which the third partner could not profit, the discharge being gratuitous; that the actings of the new trustees in ranking as creditors on the new firm's assets did not discharge the liability of the old firm; and that the third partner was liable to

TRUSTEE—*continued.*
make good the loss to the trust estate. SMITH *v.* PATRICK - - - - H. L. (Sc.) 282

UNSEAWORTHINESS—Presumption—Evidence—Cause of vessel's loss unascertainable
See PRIVY COUNCIL APPEALS. 10. 362

VICTORIA—Laws of - 128, 153, 340, 544
See PRIVY COUNCIL APPEALS. 18—21.

WAIVER—Insurance, Marine—Waiver of lien for chartered freight - - 462
See INSURANCE, MARINE.

WESTERN AUSTRALIA—Laws of 142, 347
See PRIVY COUNCIL APPEALS. 1, 2.

WHARF—Workmen's Compensation Act—"Factory"—Loading and unloading from wharf, &c. - - - - 79
See EMPLOYER AND WORKMAN. 2.

WIFE.
See HUSBAND AND WIFE.

WILL—*Class—Gift to "A. and the Children of B."—Death of A. in Testator's Lifetime—Intention of Testator—Gift to a Class—Will—Construction.*
A testator appointed "his wife and his niece A." executrixes, and gave property in trust for his wife (who survived him) for life, and after her death "for A. and the child or children of his sister B. who should attain the age of twenty-one years equally to be divided among them as tenants in common." At the date of the will A. was nearly twenty-one; she died in the testator's lifetime. At the death of the tenant for life B.'s children had attained twenty-one:—
Held, that the bequest to A. did not lapse, since upon the true construction of this particular will the testator's intention appeared to be to make one class of these nephews and nieces, so that if any of them died in his lifetime the survivors should take.
The construction of gifts to a class discussed.
The decision of the Court of Appeal, [1899] 2 Ch. 314, affirmed. KINGSBURY *v.* WALTER H. L. (E.) 187

—— Execution of—Notary present without attesting—Appeal from Ceylon - 254
See PRIVY COUNCIL APPEALS. 5.

—— Roman-Dutch law—Direct substitution in favour of children who survive testator's widow - - - - 130
See PRIVY COUNCIL APPEALS. 11.

WITNESS—Functions of judge and witness respectively—Action for passing off 308
See DECEIT.

WORDS—"Average" weekly earnings - 79
See EMPLOYER AND WORKMAN. 2.

—— "Construction" - - - 49
See EMPLOYER AND WORKMAN. 4.

—— "Customer" - - - - 414
See BANKER.

WORDS—*continued.*
—— "Debtor" - - - - 102
See BANKRUPTCY.
—— "Evasion" of statute - - - 196
See PRACTICE. 1.
—— "Factory" - - - - 79
See EMPLOYER AND WORKMAN. 2.
—— "Made" in the United Kingdom - 217
See REVENUE. 3.
—— "Molasses refined in bond" - - 544
See PRIVY COUNCIL APPEALS. 20.

WORDS—*continued.*
—— "Scaffolding" - - - - 49
See EMPLOYER AND WORKMAN. 4.

WORKMAN—Employer and.
See Cases under EMPLOYER AND WORKMAN.

ZANZIBAR—Lands taken for public purposes -
Compensation - - - 373
See PRIVY COUNCIL APPEALS. 22.

BIBL. LONDIN UNIV.

LONDON:
PRINTED BY WILLIAM CLOWES AND SONS, LIMITED,
DUKE STREET, STAMFORD STREET, S.E., AND GREAT WINDMILL STREET, W.